AMERICAN BAR ASSOCIATION JOVRNAL

VOL. XXIII MAY, 1937 NO. 5

TABLE OF CONTENTS

ASSOCIATION'S VIEWS ON THE SUPREME COURT ISSUE PRESENTED TO SENATE COMMITTEE

In response to Invitation, Chairman Smith, of the American Bar Association's Special Committee, Submits Statement on Behalf of That Body—Presents Memorandum on Recent Referenda Showing Overwhelming Opposition of Lawyers Generally, Urban and Rural, to Pending Proposals—Statement Declares That the Issue Is Whether We Shall Have An Independent Judiciary and Retain Our Form of Constitutional Government—Brief Summary of Reasons Which Have Impelled Lawyers, Regardless of Party Affiliations, to Oppose Plan—National and Nonpolitical Character of Association Emphasized—Mr. Paul Hannah Makes Statement on Behalf of Junior Bar Conference—Mr. Clarence J. Shearn, Jr., Deals with "Split Decision" Bogey—Committee Proceedings*

IN response to the invitation extended by certain members of this Committee, the American Bar Association is grateful for the opportunity to present the considered views of the lawyers of America on the President's Court proposal.

Lawyers find themselves deeply concerned over the proposal to remake the Supreme Court by the addition of six judges. The membership of the American Bar Association is made up of lawyers from every State in the union, from cities and towns of every size. They are of every conceivable description as to the nature of their practice, the type of legal work which they perform, their politics, their religion, and their incomes.

The fact that the proposed legislation affects the courts and the administration of justice makes it peculiarly the concern of members of the Bar and of this Association. Upon such a question, the public and the Congress are entitled to have the considered opinion and judgment of American lawyers in every State. A truly democratic national organization of the lawyers of America could speak and act only through the votes of its members, rather than through the determination of its Board of Governors, or its more representative House of Delegates. Leaders of small and unrepresentative organizations of lawyers may *presume* to speak upon such questions without consulting the views of any great number of disinterested lawyers, but the truly representative American Bar Association and its affiliated organizations in all of the States believe in the democratic process, and could do no less than ascertain and accept the instructions of the votes of its members, and also endeavor to ascertain the considered opinion of all lawyers who were not members of the Association. Therefore, pursuant to the new Constitution of the American Bar Association, adopted at Boston last summer, the Board of Governors, on February 18th, authorized a referendum of its 29,616 members. Such referendum was not limited to the proposal of the President as to the Supreme Court, but included a separate vote upon the merits of each of the several proposals made by the President with reference to the federal courts. There is submitted herewith a copy of the official ballot and transmittal letter in both the referendum of its own members and the referendum of the non-member lawyers of America.

Under our Association's Constitution, the conducting of the poll, the counting and tabulating of the results of this secret vote were under the supervision of the Association's Board of Elections, the Chairman of which is the Honorable Edward T. Fairchild, Justice of the Supreme Court of Wisconsin.

The attention of your Committee is called to the transmittal letter to show that the Board of Governors of the Association wanted a fair and interpretative consideration of the question. It said:

"In order that there may be a full expression of public opinion by all citizens, for the information of the Congress, with respect to each of the pending proposals as to the Courts, each member of the Associa-

*Early in March, following the Association's referendum respecting President Roosevelt's proposals for changes in the judiciary system, President Stinchfield appointed a special committee to present the views of the Association to the Congress, and to give effect to the position of the Association as determined by the referendum.

Sylvester C. Smith, Jr., of Phillipsburg, New Jersey, was appointed Chairman of the Committee, and the other members were James D. Carpenter of Jersey City, Robert F. Maguire of Portland, Oregon, Alexander W. Smith of Atlanta, Georgia, and C. R. Wharton of Greensboro, North Carolina.

On Thursday, April 15, the committee through its Chairman and through Clarence J. Shearn, Jr., of New York, and Paul F. Hannah, Secretary of the Junior Bar Conference, at the invitation of the opposition senators, presented to the Senate Judiciary Committee the views of the Association on the judiciary proposals. Their statements and a somewhat abbreviated account of the proceedings before the Senate Judiciary Committtee on that day are printed in this issue.

tion, along with other citizens, is urged by the Board of Governors to communicate his views, for or against each proposal, to the United States Senators and the members of Congress from his State. *It is recommended also that local meetings of citizens as well as local and State Bar Associations will do well to discuss publicly the reasons for and against each proposal, so that the same may be understood by the people and a full representative expression of opinion obtained thereon.* A majority of the votes upon the referendum will decide and control the attitude and action of your Association upon each proposal."

Submitted herewith is a printed memorandum showing the result of the referendum of the Association and the referendum of the non-member lawyers. In the member referendum 18,695 ballots were returned on the President's proposal with reference to the Supreme Court,—16,132 (86%) were against the proposal, and 2,563 (13%) were in favor of the proposal. On the question of adding judges of the lower courts to supplement those reaching the age of seventy, the vote was 14,401 against, with 4,048 in favor.

With reference to the other recommendations of the President included in his message to the Congress, the assignment of Circuit and District Judges, creating the office of Proctor, the right of intervention by the Attorney General, the right of direct appeal by the Attorney General, and the voluntary retirement of Justices of the Supreme Court, the vote of the membership was favorable in each case as shown by the report. We call attention to the fact that the Association in 1936 adopted a resolution favoring the enactment of the Sumners Bill, for the voluntary retirement of Justices of the Supreme Court of the United States, which bill has now become a law.

The results of this poll are interesting. It shows that the unified opinion of the rank and file of members of the Association is not influenced by the locality, by political affiliations, by clients, or by outstanding individual lawyers, and shows no differentiation between the big cities and the small towns. If anything, the poll shows that the views of lawyers in States which do not contain large cities are in the ascendancy in the policy of the Association. In every one of the 48 States and the District of Columbia members of the Association voted strongly against the proposed increase, varying from 14 to 1 in opposition in some States to slightly less than 3 to 1 in the State of Florida.

The American Bar Association, however, would not presume to speak for the lawyers of America until there had been an expression of opinion from non-member lawyers. Accordingly, the Association sent out approximately 142,320 ballots to non-member lawyers, taken from known law lists. Some 4,000 ballots were returned as unclaimed. In view of the greater number of votes involved, a longer period was allowed within which non-members might vote, and the referendum closed on April 10th. A report showing in detail the result of that referendum is submitted herewith. 40,021 (77.3%) non-member lawyers voted against the proposal to add judges to the Supreme Court; 11,770 (22%) were in favor. The vote in every State was against the proposal. Therefore, out of the total of 70,486 votes by lawyers, 56,153 voted against the Supreme Court proposal, and 14,333 for it, a ratio of 4 to 1 against.

The American Bar Association is a non-partisan, national organization of lawyers, now organized on a representative plan, with a House of Delegates of approximately 165 members, one-third chosen by vote of the members of the Association, and more than one-half chosen by State Bar Associations, representing approximately 90,000 lawyers. The Attorney General and Solicitor General of the United States are ex-officio members of the House of Delegates, and sat in the meeting at Boston. By reason of this organization, we have been able to collect much information as to many of the Bar Associations of the States, counties, districts, and cities which have considered the President's proposal. All of the information received is found assembled in another memorandum hereto attached, indicating, by States, what many of the Bar Associations have said with relation to the proposal. Your attention is called to the referenda conducted in States where there is an integrated bar, (i. e. every practicing lawyer belongs to the association): Michigan—3405 against, 990 in favor; Oregon—1383 against, 266 in favor; South Dakota—446 against, 82 in favor; Washington—1601 against, 370 in favor.

These additional referenda by State Bar Associations where every lawyer, to practice law, must be a member of the State Bar Association, confirm the accuracy of the polls conducted by the American Bar Association.

In ascertaining the considered opinion of lawyers, this Committee learned certain facts which it deems proper to report. First, the lawyers of America in every section and State of the Union are more aroused over the Supreme Court proposal, and the threat to an independent judiciary, than they have been on any previous occasion since the Civil War; second, the strongest feeling is expressed in the smaller cities and county seats. The country lawyer has the confidence of the people back home; he is a respected leader of public opinion in his community. It is significant that the opinion of lawyers back home is being sought by the plain people of all ranks and conditions of life and economic position. This is because the people believe that the lawyer knows more than the average citizen about the United States Supreme Court and Federal Courts, and how they work, and what the Supreme Court has done, how this proposal to add six Justices to the Supreme Court will affect the constitutional rights of citizens and our form of government.

This feeling results not only from the experience of the people, but from their knowledge of history.

They know what lawyers in the past have done in making and preserving the United States—that lawyers were responsible for the Declaration of Independence and the Constitution of the United States; that of the Presidents, twenty-two have been lawyers; that the lawyer's business has been to deal with the courts. It also seems reasonable to conclude that the people have largely entrusted the business of government to lawyers, because they have sent so many lawyers to the Senate, the House of Representatives and the State Legislatures.

It is appreciated that for several weeks full reasons have been given to this Committee why this proposed bill, in its present form, should not be passed. We will not repeat these arguments. We should like merely to emphasize briefly the primary fears which have stirred lawyers, regardless of party affiliations, to oppose this bill.

There are certain deeply founded objections that will not ordinarily appear to the mind of the lay citizen. First we believe that the proposal to add six Justices to the Supreme Court, in the manner proposed, is in a moral and spiritual sense unconstitutional. Some lawyers are inclined to question the constitutionality of the proposal as a strict matter of law; the latter consideration seems to us of little importance. It is not the mere letter of the Constitution which is important; it is the spirit of the Constitution. Its spirit essentially demands the division of the powers of government into three separate branches; that the judicial power be exercised wholly uninfluenced and uncontrolled by any other branch of the government. To force at one time the addition of six Justices, named by one executive, to the Supreme Court, violates of necessity the spirit of judicial independence, the basis of our Constitution.

It is not important that in this proposal the apparent letter of the law is followed. The true objective of the measure is to force the judiciary to adopt the constitutional views of the Executive and the Legislature. The effect is clearly to defeat the balance of powers essential to Constitutional government. The real reason for the proposed measure must be the selection of Justices whose views on known or future, similar legislation are different from the views of those Justices now sitting. The President's advisors are perfectly willing to keep the Supreme Court, but they insist that the Court interpret the Constitution in accordance with their views. One is necessarily reminded that the Puritan fathers came to America for the privilege of worshipping God as they pleased; that, however, when here, they insisted that everybody also worship God exactly as they did.

Secondly, no decent, reputable lawyer has ever tried a case, who would accept, in the most unimportant litigation, a juror whose views with relation to the case were known in advance, nor would the law, the practice, or the judges knowingly permit packing the jury. Both lawyers and laymen condemn and fear packed juries or partial judges. Yet here it is proposed that there be made a part of the last refuge of the oppressed, the Supreme Court of the United States, men whose broad views will be known before they accept positions on the Supreme Court. A farmer's wife has stated this position clearly, when she said:

"I understand that the government (i. e., the administration) never gets into court unless it is one of the parties, and some individual is on the other side. As I see it, the Attorney General wants the government to be both a litigant party and judge. That seems to be two against one, and that's not fair."

Over and above the Constitution, the American ideas of government, of democracy itself, there is involved in this proposal the keystone of any organized society. Ever since man first began to substitute the judicial process for fighting as a method for settling disputes, there has been one requirement above all others, that is, placing in the judgment seat a man who, for the purposes of the issue to be adjudged, can not be "reached" by any of the parties thereto. A judge may be unlearned, unwise, in fact, not particularly intelligent. He may be a man personally distasteful. Notwithstanding such characteristics, he may be an acceptable judge. Once, however, his decision can be obtained, or even appear to be obtained, by the influence of any litigant, the usefulness of his decision so far as specific settlement of the dispute is concerned is almost certain to be destroyed. In the great questions which come before the Court today, and which are responsible for the present controversy, a government and the administration in charge of that government is a party. In practically all cases of present importance, the Federal Government is a party and a citizen the adverse party. If the people know in advance of a hearing that the administration has selected a judge who will be presumed to favor the government's contention, respect for his decision must be gone.

In all subsequent disputes, even among private litigants, the losing party will be subject to the pressure of the fear that the judge once influenced may have been influenced again. Such a situation destroys the greatest value of the judicial process, namely the peaceful acceptance by the defeated party of the decision of the Court.

Lastly, the facts which completely shock lawyers and thinking citizens are that the proposal will not obtain its objective, and that the changes which are proposed can be made by amendment to the Constitution. There will still be votes of eight to seven in a court of fifteen judges, and one Justice of the Supreme Court may still hold a balance of power, against which the president complains, to defeat the legislative policy. There will still be old men serving in the court of fifteen Justices. If the President's objective is to curb the power of the Supreme Court in declaring acts of Con-

gress and the States unconstitutional, this can be done now by an amendment. If the object of the court proposal is to infuse new blood by the retirement of the old Justices, this can be done *now* by an amendment, as suggested by Dean Young B. Smith. No lawyer can conscientiously object to any plan where these two questions are submitted to the people in accordance with the spirit of the Constitution.

These views are submitted because we believe that the people and your committee want to know what is the considered view of lawyers, who, by reason of their education, study, and experience with the courts and administration of justice and problems of government, have a greater understanding of the issue involved in the proposed legislation. That issue is: Shall we retain an independent judiciary? Shall we keep the form of constitutional government, adopted by our forefathers, of three separate and independent branches? Shall we continue to rely upon our untrammeled courts and reject force as the method for settling disputes between our citizens and our government?

The considered opinion of the lawyers of America, democratically arrived at, is: YES, we want an independent judiciary; we want to retain our form of constitutional government, we want the people alone, by amendment, to pass upon any change in the Constitution that the Executive and the Congress deem necessary for the social and economic needs of the people.

SYLVESTER C. SMITH, Phillipsburg, N. J., Chairman;
JAMES D. CARPENTER, Jersey City, N. J.;
ROBERT F. MAGUIRE, Portland, Oregon;
ALEX W. SMITH, JR., Atlanta, Georgia;
C. R. WHARTON, Greensboro, N. C.

Ex-Officio

FREDERICK H. STINCHFIELD, Minneapolis, Minn., President, American Bar Association:
GEORGE M. MORRIS, Washington, D. C., Chairman, House of Delegates, American Bar Association.

PROCEEDINGS AT SESSION OF SENATE JUDICIARY COMMITTEE ON APRIL 15

Questions as to Conduct and Results of Recent Referenda—American Bar Association Poll Corroborated by Vote in State Bar Associations—Circuit and District Court Proposals—Existing Vacancies—Membership of American Bar Association Representative of the Whole Country—Association Has Never Recommended Additional Members for the Supreme Court—Colloquy as to President Roosevelt's Statement about Appointments to Court—"The Last Refuge of the Oppressed"—Statement and Elaborate Statistics Relating to "Split Decisions"—How the Younger Members of the Bar View the Court Proposal

SENATOR NEELY presided at the session of the Judiciary Committee at which representatives of the Association appeared. Before presenting the statement for the Association's Committee Mr. Smith identified himself, at the suggestion of Senator Austin. He said he was a New Jersey lawyer, of Phillipsburg in that State, and chairman of a Special Committee of the American Bar Association to present the views of the Association on the President's proposal. "I might explain," he added, "that I happen to be a New Deal Democrat from New Jersey, who has supported the President in both campaigns, and at all times, but who differs with him personally on this proposal."

At the conclusion of the prepared statement on behalf of the Special Committee, which is printed in full in this issue, Mr. Smith called attention to two booklets annexed to the report. The first gave the result of the referendum of the members of the American Bar Association on the President's proposals and the second gave the results of the referendum of the non-members of the Association throughout the country. For purposes of convenience, he added, the figures for the member poll, and also the total for the two polls had been inserted in the latter booklet.

Senators immediately manifested interest in these statistics. Senators McGill and King asked certain questions as to the contents of the booklets. Mr. Smith took occasion to point out that on all of the questions, except with reference to the number of judges, in both the lower courts and the Supreme Court, the total vote of the members of the Association and the non-members was in favor of the President's proposals. Senator Austin observed: "I understood you to say that you have recorded here all the lawyers in the United States, of whom you had any address." Mr. Smith replied:

"That is correct, sir. That list was obtained from the best known lists that we could get. According to the best information last year—the American Bar As-

sociation made a study—we found that there were approximately 170,000 lawyers in the United States. We tried to reach them, through the best available law lists, which were checked and rechecked. A total of over 142,000 ballots were sent out. Some 4,000 were returned as unclaimed, and these votes are the results of that referendum.

"In that connection, I might point out that the referenda which were taken by other associations, which is in an additional memorandum that I referred to, showed in some of the States that more lawyers voted in their poll than in the poll of the American Bar Association. I pointed that out, in Michigan and Oregon and South Dakota, and in the State of Washington. Their votes simply confirmed our poll. The ratio was the same, or if anything a greater proportion, against the proposal. That was due to the fact that in the integrated bar every man practicing law must be a member of the bar association, and those ballots were taken before ours, and many of them may have felt they did not need to vote twice on the same question."

SENATOR AUSTIN: "Mr. Smith, speaking about the principle of this matter, I think it is a noticeable fact that practically every witness who has appeared before us has emphasized the interest and the right of the individual inhabitant of this country, and the necessity of having an independent Supreme Court for the protection of his rights. I think no one has laid stress upon another thing which I ask you about, because you represent the American Bar Association, and it seems to me that it is appropriate for you to speak of it, on that account. Is it not equally vital that we should preserve the independence of the Supreme Court for the purpose of having a well known, all-pervading law reaching throughout our country, throughout our entire jurisdiction, which shall preserve the Government itself? Is it not necessary to have that Supreme Court independent, in order that the Government itself may be preserved?"

MR. SMITH: "Yes, I think that is very essential. When people who are discontented with the form of government resent the government's exercise of its lawful powers, if they lack confidence in the court, they resort to force.

"Respect for the Court, in the eyes of every lawyer, is essential. It is very unfortunate, sir, that some men use phrases which attack the Court and destroy confidence in it. The people have faith in the courts. All courts have not been perfect, but they have done a very good job in preserving our form of government. They have retained the confidence of the people, and it is because of the courts that the Government has protected its own existence against the settlement of disputes by force."

SENATOR CONNALLY: "The Government is frequently a party to arbitration matters with other countries, and sometimes with individuals, in the matter of claims. What would you think of an arbitration tribunal, if, when it did not rule as the Government wanted it to, you should put on three or four more arbitrators, whose minds ran in a certain direction?

MR. SMITH: "Of course, that is contrary to all ideas of international justice, and no other government would undertake to accept the decision of any arbitration commission, if our government packed that commission with people whose broad views on the question were known in advance.

SENATOR CONNALLY: "Is it not a fact that in practically all arbitrations it is contemplated that one man shall be the deciding factor, because each side selects one, and then they usually suggest a third one, or some independent government is invited to select a third one, with the idea that possibly one man would be the deciding factor in those decisions?"

MR. SMITH: "That is my understanding, although I am not an international lawyer. But I would like to say that it is easier for the people to understand this thing from the manner in which they decide their own disputes."

SENATOR CONNALLY: "Let us take another instance. We have a Court of Claims, whose duty it is to pass on claims of individual citizens against the Government of the United States. Now suppose that court, or the Government, should decide, 'Well, this Court of Claims is getting a little extravagant, it is allowing too many claims against the Government. We don't know, they might or they might not be wrong, but we want to cut the budget. We don't want to pay out so much in claims, so we will just put on four or five new judges over there, that have minds that run along with this economy of Congress and economy of administration.' Would you think that would be all right?"

MR. SMITH: "I would not, sir. Neither would the citizens."

SENATOR CONNALLY: "We have also an Interstate Commerce Commission, that is supposed to rule between the railroads and the shippers, and that is supposed to represent the public interest,—nobody's interest but that of the public. Suppose in the exercise of its jurisdiction we decide, 'Well, it is a little too hard on the railroads. We don't think they ought to be so hard on the railroads?' What would you think of putting on four or five new Interstate Commerce Commissioners, who had been railroad lawyers, possibly, and who would take care of the roads?"

MR. SMITH: "I would object, of course, and almost any lawyer would. And certainly the people would object if the Interstate Commerce Commission were composed of railroad presidents or vice-presidents, or general counsel, or anyone who had any connection with the railroads."

SENATOR CONNALLY: "Turning it around the other way, suppose that any administration in power might think the Interstate Commerce Commission was giving too much to the railroads, and should say,

'Well, we will just put some more men on there, that will cut these rates, and probably fix them at confiscatory figures.' I am not anticipating that that would ever occur, but if it should occur, how would it be just to put on some more commissioners to correct that situation?"

MR. SMITH: "It would be wrong in principle, and I do not think any Senate of the United States would tolerate it."

SENATOR CONNALLY: "The rates, of course, and the decisions of the Interstate Commerce Commission can be appealed from to the courts, and in the final analysis the Supreme Court might pass on those matters. Do you think it would be all right then to put some more members on the Court, so that they would go along with it?"

MR. SMITH: "No, I do not."

CONDUCT AND RESULTS OF REFERENDUM

SENATOR MCGILL hereupon began to question Mr. Smith somewhat at length upon the conduct and results of the referendum previously referred to.

SENATOR MCGILL: "How many lawyers do you say there are in the United States?"

MR. SMITH: "According to the best information that we have as to lawyers in the United States, there are approximately 170,000 lawyers engaged in the practice of law. That is based upon census figures, and also upon figures which we have taken from records of the several States."

SENATOR MCGILL: "Did you send ballots to all those 170,000 lawyers?"

MR. SMITH: "We sent out 142,360 ballots to the non-member lawyers. There were some 4,000 returned. In addition to that we sent out 29,600 to lawyers who were members of the Association. That was all of the addresses that we could get."

SENATOR MCGILL: "How many members are there of the American Bar Association?"

MR. SMITH: "Now, very close to 30,000. At the time the referendum was taken, 29,600."

SENATOR MCGILL: "So the total number you sent out was approximately 170,000 ballots?"

MR. SMITH: "That is correct, sir."

SENATOR MCGILL: "And you received back about 70,400 or 70,500?"

MR. SMITH: "That is correct, sir."

SENATOR MCGILL: "I notice that you seem not to have very many ballots from some of the States, comparatively speaking. For instance, from Alabama, you have about 600."

MR. SMITH: "That is correct."

SENATOR MCGILL: "Do you know how many lawyers there are in Alabama?"

MR. SMITH: "I do not know off-hand at the present time, except that I would say that the number of lawyers in Alabama was less than 1,000. If they were in excess of 1,000, they would have more than one member of the House of Delegates."

SENATOR CONNALLY: "You mean members of the Association, or the entire membership of the bar?"

MR. SMITH: "Our House of Delegates is based upon the total number of lawyers, according to the last Federal census. The House of Delegates, which of course is new, is based upon a representative system, representing all of the lawyers of the States."

SENATOR MCGILL: "And not just the members, but the bar as a whole?"

MR. SMITH: "No. This new plan was to represent all of the lawyers, the legal profession, on the whole, in the most democratic manner that we could possibly adopt."

SENATOR MCGILL: "I see you have something like 900 votes from the State of Iowa."

MR. SMITH: "Yes, sir."

SENATOR MCGILL: "How many lawyers do you say there are in Iowa?"

MR. SMITH: "I think that there are approximately 2,300, if I am not mistaken. I could get those figures and present them to you in detail."

SENATOR MCGILL: "You have a little over 900 in the State of Kansas. Do you know how many lawyers there are in that State?"

MR. SMITH: "I could not tell you off-hand, Senator. I have that data, but as I recall it, we have two members of the House of Delegates from Kansas, so that there are between 2,000 and 3,000 lawyers."

SENATOR MCGILL: "So you have ballots from less than one-third of them?"

MR. SMITH: "In that particular State? That may be true. As to the number of ballots, we only have 70,000 out of 170,000. But every voter does not vote in the election for the President of the United States, either."

SENATOR MCGILL: "In Kentucky you have a little over 900. Do you know how many lawyers there are in Kentucky?"

MR. SMITH: "Less than 2,000."

SENATOR MCGILL: "Your returns, however, are from approximately one-half of the lawyers of the United States?"

MR. SMITH: "That is, the votes that were returned."

SENATOR MCGILL: "And your ballots were against both the proposals—that is, the majority was against both of the proposals—the one with reference to the Supreme Court, the appointment of Justices to that Court on the basis of Judges arriving at the age of 70, and having served 10 years, and all lower Federal courts?"

MR. SMITH: "Yes, sir."

SENATOR MCGILL: "Your Association, as you represent it, as I get it, would be opposed to the appointment of any judges to any of the Federal Courts, based upon that proposition?"

MR. SMITH: "Yes. The total vote of the lawyers on that question—that is, both members and non-members—is 51,156 against, and 18,533 for."

SENATOR MCGILL: "You sent ballots to all of your 30,000 members, we will say, or 29,600, and you re-

ceived back something like 18,000 or 19,000 ballots."

MR. SMITH: "18,000."

SENATOR MCGILL: "And you received ballots from non-members of something like 51,000 or 52,000?"

MR. SMITH: "That is right. I may say, Senator, speaking with reference to the accuracy, however, of this poll, that we have collected some information which I think is important. For instance, in the State of Alabama the State Bar Association conducted a referendum. Their referendum showed 846 lawyers against, and 313 in favor. You will find that the proportions run through the whole poll. That was the State Bar Association. It is a greater number of ballots than in our poll, but the percentage that is against is the same or even greater. There are a number of such States in this referendum."

REFERENDUM BY STATE AND LOCAL ASSOCIATIONS

SENATOR MCGILL then asked some further questions as to the date on which the ballots were sent out for the two referenda and the time allowed for their return. Mr. Smith replied with the information desired. Senator King then inquired if Mr. Smith wished to make any further statement as to the referenda in a number of States by the State and Local Bar Associations, or in which the returns showed a larger number opposed to the proposal than in the Association polls.

MR. SMITH, in response, presented a "memorandum showing action of State and Local Bar Associations with respect to increase in the number of Judges of the Federal Courts," which was made a part of the record. Senator King then inquired if Mr. Smith would give some illustration of the supplemental material. The answer and further questions and answers on this point were as follows:

MR. SMITH: "I have given you the Alabama situation, but let us take Michigan, for instance. Michigan is an integrated bar. Every lawyer is a member of the State Bar Association."

SENATOR KING: "You mean every man who practices law?"

MR. SMITH: "Every man who practices law. It is an integrated bar. They took a referendum. The result was 3,405 against, 990 in favor. The percentage shows in our poll, both members and non-members, the same ratio. South Dakota is another illustration.

"In Massachusetts, for instance, there was a limited referendum, because the State Bar Association has not a very great membership. There were 676 against, and 47 in favor. That was not an integrated bar, but there were county bar associations which also acted on the matter.

"Any analysis of this would show the tremendous corroboration of the votes of the American Bar Association poll. Let us take the State of Minnesota, for instance. A referendum was conducted, the result being 1,744 lawyers against, and 454 in favor—confirming the poll which was taken. If anything, that shows a greater percentage than ours. The number of others are given in this memorandum, which is part of the record, and it all tends to confirm our accuracy."

SENATOR MCGILL: "Might not those later tabulations on polls that were taken include many of the same lawyers who had been included in your original poll?"

MR. SMITH: "Senator, the two overlap, because many of the members of the American Bar Association voted in both polls. But my point is this, that all of these lawyers in Michigan who voted expressed their opinion in the State count, in that poll. They simply confirmed that opinion when they were voting in our American Bar Association poll. We did not attempt to total the State polls at all. We simply submit the results there, and say that the lawyers of America, members and non-members of the American Bar Association, are against the proposal, and in each of the States the ratio in which they voted against the proposal in the American Bar Association total poll is borne out by the referenda taken by the local bar associations.

"It is surprising how those figures are corroborated in State after State, and any analysis would indicate that the correctness of our poll is shown by the action taken by the local associations, irrespective of the section of the country. It is interesting to note that those against the proposals in the Democratic sections, and Democratic local sections of the State, are against it without any regard to politics at all. We have one section that reports all Democrats who are members of the State or the local bar association, and I think there is one vote in favor of the proposal. This is not a political question so far as the lawyers are concerned."

AS TO CIRCUIT AND DISTRICT COURTS

SENATOR HUGHES here called attention to what he regarded as a curious circumstance and one which raised a question in his mind as to whether the members of the Bar had voted thoughtfully on the proposal "with respect to the United States Circuit Court of Appeals, District Courts and other Courts." There has been an almost unanimous demand in Delaware that a new district judgeship be created because the Court is behind about two years in its business. There had also been a demand in the Circuit to create two Circuit Judgeships, because of the age of one judge and the sickness of another. Since he had been in Washington there had been added a new judge to that district and that circuit. Furthermore, the letters which he had received from influential members of the Bar in Delaware had been almost two to one in favor of this bill. That was a curious thing to him, and he wondered whether members of the Bar had thought about the other provisions of the bill.

MR. SMITH: "Senator, with reference to whether

or not they have thought about that, I happen to come from the New Jersey Bar, and up in that circuit."

SENATOR HUGHES: "You know the conditions there."

MR. SMITH: "I do, sir, and the difference is this: that on the specific question of adding judges to the lower courts throughout the entire country, the lawyers look at it in a different manner from that in which they would upon a bill adding judges or taking care of the condition in the Third Circuit. We have already added a judge from your state, I believe, at the present time, and I think that perhaps the work will be speeded up in the Third Circuit."

SENATOR HUGHES: "They hope so. I hope so."

MR. SMITH: "The American Bar Association, so far as its position is concerned, wants this work speeded up. They have voted in favor of the Proctor. They voted in favor of the assignment of judges. They voted in favor of all the other recommendations, except the first two. And of course, one of the reasons why many lawyers voted in favor of the assignment of judges was that they felt that they could in that matter speed up the work in these circuits that were behind. The American Bar Association did not reject all of these things it voted on."

SENATOR HUGHES: "Do you think it better that we should deal with the broad proposition all over the country, as to our circuit courts and our district courts, rather than to have a judge created in this or that district or circuit to help out a situation? Sometimes he is not as much needed as they claim, and it does not seem to me it works out uniformly. It is not as desirable a system as treating it as one broad proposition covering the whole country."

MR. SMITH: "There is a difference of opinion as to that. In some instances they think it would be good. For instance, Judge Knox presented views with reference to the Second Circuit I believe yesterday. The difficulty with the bill in that respect—I am speaking now for the lawyers—is that it does not do the thing in those circuits that need relief. There are a number of lawyers who have given this very careful study, this particular question, and voted against this addition of judges. They believed that the bill might be amended in such a manner as to provide for that, but they are taking this bill just as it is, without the amendment. We did not vote upon anything else."

SENATOR HUGHES: "They do not seem to favor the assignment of judges from one district or circuit to another. . . ."

MR. SMITH: "May I call your attention to the fact that the American Bar Association members voted in favor of the assignment of circuit and district judges, 11,462 for, and 6,837 against. The total vote of the lawyers was 40,482 for, and 27,495 against. So that the position which our Association takes—we are governed by the results of that ballot—is, we favor the assignment of circuit and district judges. . . .

"I may say I think it is only fair to state that the American Bar Association initiated the present system of Federal courts in 1892, and fought the battle single-handed. I think that Senator Hughes is probably familiar with that, because he has long been a member, and that as a matter of fact the Association had gone on record in favor of the Sumners bill, before even the President mentioned it or approved it in his message."

SENATOR HUGHES: "I am not finding any fault with the Bar Association."

SENATOR KING: "Is it not a fact when Congress upon a number of occasions has made provision for either circuit or district judges, or both, political quarrels have ensued, and the positions have not been filled for many, many months, sometimes for over a year?"

MR. SMITH: "I think the Senators are more familiar with that than we are. But I wanted to say this, that the American Bar Association Committee has frequently recommended additional judges, long before the political parties and their representatives have done so. I think that the attitude of the Association has been in favor of speeding up justice, not interfering with it. We do not deal with anything but the administration of justice. We are a non-partisan association."

SENATOR KING: "Has there been any disposition upon the part of Congress, when the needs of a district or a circuit have been presented, and it has been shown that they needed more help, not to grant the relief required, so far as you know?"

MR. SMITH: "I do not know. I think they have been a little tardy sometimes. Our Association has felt that. We tried to be ahead of the movement. . . ."

EXISTING COURT VACANCIES

SENATOR KING: "There are eight or nine vacancies now, some of which have existed for a year, and the appointing power has not moved. Do you not think it is better, after all, to let each case be presented to the Congress, depending upon their fairness to meet the needs of the people, instead of providing for 40 or 50 judges in one bill?"

MR. SMITH: "That is my own personal view and apparently the view of most of the lawyers. The objections to the provisions of the present bill are the age provisions. . . ."

SENATOR MCGILL: "There is just one other thing. I do not want to cause you to reiterate what you may have said before I came in, but you have what you call a House of Delegates. Is that some voting body in the American Bar Association?"

MR. SMITH: "Before 1936, before our Boston meeting, our business and policy were conducted and formulated by the executive committee, and the policy was determined when the members could get a chance to vote at the annual meeting. It was really a meeting of the lawyers who travelled some distance, and it was

a town meeting. For years there has been a group in the American Bar Association working for a more representative organization of the bar and of the legal profession. Last year at Boston we adopted this plan of the House of Delegates, that controls the policy of the Association."

SENATOR MCGILL: "So far as passing any resolutions or anything of that sort, at times other than when you are in your national convention of your association, they are the controlling factors, are they not?"

MR. SMITH: "They determine the policy of the association, but they are also subject to another control. We have checks and balances. We have also an Assembly, and the Assembly is held at the annual meeting, where any member can speak. Any member can introduce any kind of resolution, which is referred to a resolutions committee, and at Boston Mr. Solicitor General Stanley Reed served on that committee with some of us, and did very well. They can not bottle up any resolution. It can not die there as it used to, under the old system. The resolutions committee must report out the resolution and give the Assembly the chance to vote on it. If the House of Delegates does not concur in the resolution adopted by the Assembly, then the Assembly, the members attending the annual meeting, can determine the policy by referendum. The entire system of the American Bar Association at the present time, its organization, is designed to give expression to what the lawyer in America thinks on problems affecting the administration of justice and the courts. We do not go beyond that."

SENATOR MCGILL: "Has any resolution other than is indicated by this referendum vote been adopted by any branch of the American Bar Association, relative to the proposed legislation?"

MR. SMITH: "Yes. Mr. Hannah, who will follow me, will speak for the Junior Bar Conference and Council. The House of Delegates met in January at Columbus. This proposition was not before us at that time. The Board of Governors, which handles the business in between its meetings, adopted no resolution other than to provide for this referendum, and to decide that the Association would be governed by the results of the ballots returned.

"There has been no attempt on the part of the officers, the Board of Governors, or the House of Delegates to control the action. If the members had voted in favor of the proposal, the American Bar Association would have reported they had voted that way. We are now confirmed in our view by the votes of the non-member lawyers."

SENATOR MCGILL: "It occurs to me that I have read, some time back, that some officials of the American Bar Association have announced themselves as very strongly opposed to the bill, and that that occurred prior to the time of this referendum."

MR. SMITH: "They did as individuals, and specifically said so. But no man attempted nor would dare attempt to speak for the association."

SENATOR MCGILL: "But those officials gave their own personal attitude towards the legislation wide publicity prior to the time of the referendum, did they not?"

MR. SMITH: "Yes. So did the Attorney General of the United States. He is a member of the Association, and sat beside us in the House of Delegates. But they spoke as individuals. They were not speaking for the American Bar Association."

SENATOR STEIWER: "On account of the difficulty of hearing in this room, I did not understand perfectly what you said about the attitude of the American Bar Association in past times with respect to increasing the number of Justices of the Supreme Court. I believe you said that the Bar Association had favored an increase at one time."

MR. SMITH: "No, they have from time to time favored additional judges in the circuits, as they were needed. They have been more forward in proposing that than any other organization. In fact, they have been the only articulate representative body. We have never favored additions to the Supreme Court since we have been in existence, for 59 years. . . ."

* *

SENATOR CONNALLY: "I believe you said that of course all of the members of the bar did not vote.

MR. SMITH: "No, they did not."

SENATOR CONNALLY: "Either in the American Bar Association poll or in the polls conducted by the State Bar Associations. It is rather well known that the weakness of lawyers is procrastination. Is it not likely that the failure to vote was attributable to their getting these notices and being busy and laying them aside? The reason I call that up is that it seems to me that the percentage running through the State Bar Association polls and the American Bar Association poll, although the numbers vary, is practically the same. We all know how lawyers put off till tomorrow what they do not want to do today, because of the pressure of business, or other things."

MR. SMITH: "I think that explains it, Senator. They put it off. Lots of us do that."

CORPORATION AFFILIATION NOT REQUIRED

SENATOR CONNALLY: "Is the American Bar Association confined to corporation lawyers? Is that required of members, that you have got to be a corporation lawyer?"

MR. SMITH: "No, it is not required of the membership, and that is one of the things which is absolute misrepresentation. We have men in our profession and in the American Bar Association who are, just like myself, plain country lawyers representing the man on the street, the people back home, the farmer and others."

SENATOR CONNALLY: "You live at Phillipsburg, New Jersey?"

MR. SMITH: "That is correct, sir."

SENATOR CONNALLY: "How large a city is that?"

MR. SMITH: "20,000."

SENATOR CONNALLY: "Is it or not true that in the American Bar Association there are country lawyers that live in little county seat towns, who, if they were to see a corporation, would hide in the brush?"

MR. SMITH: "Well, I do not know that they would do that; they might welcome them for the business they would get. . ."

SENATOR CONNALLY: "Is your association representative, I mean, of the whole country and of the whole bar, regardless of whether they live in the city or in the county seat town or elsewhere?"

MR. SMITH: "It is, sir. I could give you information, based upon our membership and taken from the best available lists of ratings of lawyers, to show you that we represent ordinary lawyers, that a great percentage of our membership comes from small towns and communities, and are not rich, and do not have large corporate clients."

SENATOR CONNALLY: "Do you know whether that is also true in probably a large degree with the State associations?"

MR. SMITH: "I only can speak for those I know of. It certainly is true of the integrated bars of several States."

SENATOR CONNALLY: "In the total, there are more members of State Bar Associations, of course, than there are in the American Bar Association?"

MR. SMITH: "90,000."

SENATOR CONNALLY: "And being larger and a more numerous membership, they would naturally reach out into certain avenues that the American Bar Association probably did not reach, and yet your percentage of votes in the State Bar Associations is practically identical with that in the American Bar Association."

MR. SMITH: "That is true."

SENATOR CONNALLY: "Revealing, as I see it, the fact that this percentage of opposition runs through the whole bar, whether they are country lawyers or city lawyers or corn field lawyers, or any other kind of lawyers."

SENATOR MCGILL: "There is only one thing I had in mind, that was brought out by Senator Steiwer. As I understand, you said the American Bar Association had never taken any position with reference to the Supreme Court, up until the time this measure was introduced."

MR. SMITH: "As to additional members of the Supreme Court?"

SENATOR MCGILL: "Some committee of the American Bar Association did report to the Association in 1921, did they not, favoring the addition of two members to the Supreme Court, in addition to the Chief Justice?"

MR. SMITH: "I would like to correct the record on that, sir. That is not the fact. The record was that a committee discussed that as a proposition. They made no recommendation and no action was taken by the American Bar Association at the time."

SENATOR MCGILL: "No official action?"

MR. SMITH: "No official action was taken, and as a matter of fact the committee did not so recommend it."

SENATOR MCGILL: "The suggestions of that committee are contained in the proceedings of your association of that year?"

MR. SMITH: "That is correct, sir. If the matter had come before the association at that time I am convinced that the Association would have voted against that resolution."

SENATOR MCGILL: "They never voted at all, did they?"

MR. SMITH: "No, because the committee did not recommend it. . . ."

PRESIDENT'S POSITION ON APPOINTMENTS

SENATOR NEELY: "Mr. Smith, there is a statement on page 9 of your memorandum, to which I wish to direct your attention. It says in part:

" 'Yet, here, it is proposed that there be made a part of the last refuge of the oppressed, the Supreme Court of the United States, men whose broad views will be known before they accept positions on the Supreme Court.'

"Does that statement accurately represent your view on this matter that is before the Committee, too?"

MR. SMITH: "I think that that statement is taken from what was said by the President. I think it was in his fireside talk, when he indicated that 'I will appoint Justices who will not undertake to override the judgment of the Congress on legislative policy.' That statement which he made would indicate that he would ascertain beforehand what views they would have. And I take it that he did not mean specific views on specific legislation, but broad views, and for that reason I think that that indicates how the lawyers feel generally on the matter."

SENATOR NEELY: "You have stated that you supported the President in both of his campaigns."

MR. SMITH: "Yes, sir."

SENATOR NEELY: "I suppose it is safe to assume that you had some confidence in him or you would not have done that."

MR. SMITH: "I still have confidence in the President. I am sorry he has taken this position. I believe not only that he is right, but I think that his broad legislative program is good. Personally I think that he can attain these objectives by more careful draftsmanship, and I think he can attain them by amendment, which I favor."

SENATOR NEELY: "In view of the confidence which you had in him when you supported him for election as President, and in view of the confidence which you have now expressed yourself as having in him, do you think you are justified in this broad implication here, that the President really intends to

ascertain the views of these new judges before they are appointed, in the event that this bill becoms a law?"

MR. SMITH: "I was rather shocked to have him say so, as he did. It grated on one's ears. I did not like it, but I have to take what he said. I heard him—heard him as millions of people heard him, and I can only take what an ordinary man would understand those words to mean. I do not mean to say, Senator, that my President, and the man in whom I have confidence, would say 'How will you vote on this specific legislation?' But I do think that he has stated to the country he will find out what their broad views are, and he would not appoint a man, as did President Hoover, when he appointed Mr. Justice Cardozo, a great liberal, on the Court. Mr. Hoover was certainly not a progressive. He was a conservative. But he named a very great liberal on the Court, and he did not ascertain his broad views. He could have. They were known in every report of the Court of Appeals of the State of New York, in every article that he had written. It is the broad view that affects the judgment of people. And it is unfortunate, but I have to take what he said. It is the President's word. I heard it. So did you, sir, I take it."

SENATOR NEELY: "Yes, I did, and I interpret his language to mean something entirely different from the interpretation which you have placed upon it. Can you think of any time, with the possible exception of the instance to which you have referred, when a President appointed a member of the Supreme Court of the United States, and he did not take some pains to ascertain his broad views on public questions?"

MR. SMITH: "I think Theodore Roosevelt did it, as I read the history. I think that there has been a tendency to do that, when vacancies arose. I think that that is part of the political game, but I do not think that it has ever been as specifically directed as in the present case. I had hoped that the example that was set in the appointment of Mr. Justice Cardozo—and at that time in the appointment of Mr. Justice Roberts, whom I felt to be a liberal, and some of the Senators did, too—showed that we had arrived at a new era in the selection of judges, and that that question would not be raised. That is what makes this suggestion a little shocking right now. And I think the average lawyer feels that.

"I think President Roosevelt would appoint good men to the bench, but I am afraid that this implication will affect the independence of the judiciary in the minds of the people, and that the ultimate effect would be bad."

SENATOR NEELY: "Mr. Smith, there was nothing in the President's address which could serve as a basis for your statement that the Supreme Court was 'the last refuge of the oppressed,' was there? That is an original thought, is it not?"

MR. SMITH: "No, I do not think that that is original with my committee, nor with me. I think that that is the history of the Supreme Court from the very beginning. I think that from the very beginning, the Supreme Court has upheld the rights of individual citizens. That has been the reason why the people generally have gained confidence in it. . . ."

SENATOR NEELY: "Mr. Smith, do you think specifically that the Supreme Court proved itself to be the last refuge of the oppressed when it rendered the Dred Scott decision, that said that the children of negroes, in a free state, were slaves, and in effect that you could follow those children with bloodhounds and take them to a State in which their master had formerly lived?

MR. SMITH: "No, in that instance it did not. But if it fell down in that instance, it did preserve the rights of the oppressed in many others—for instance, in the De Jonge case. Here was a communist. Certainly if anyone was oppressed, he was. He was a communist, and the present Supreme Court took care of that man, saved him from a long prison sentence, and he could not have gone anywhere else. He had been to the Oregon supreme court. He did not get justice there, in the sense of constitutional protection."

SUPREME COURT AND THE OPPRESSED

SENATOR NEELY: "Do you think that the Supreme Court proved itself to be the last refuge of the oppressed when it held the first income tax law was unconstitutional—when one Justice changed his mind and decided that the income tax law was unconstitutional, after he had first held that it was constitutional?"

MR. SMITH: "I do not think that that involved the Bill of Rights, nor rights of the individual. I think that that involved an interpretation of the taxing power, and I do not think that at that time it had the effect that I think of when I speak of the Supreme Court protecting individual rights under the Bill of Rights. Of course, I did not agree with the decision. I am a Democrat, sir, and I think it was a mistake, and we corrected it by an amendment. But we do not always interpret things the same way."

SENATOR KING: "I direct your attention, with the permission of my very dear friend here, to the fact that President Jefferson and the extreme Democrats in his day attacked the Supreme Court when it affirmed the validity of the income tax, away back in the Hilton case, contending that the income tax, if it is levied at all, must be levied by the States, and that this was an infringement upon the States."

MR. SMITH: "I am familiar with the political aspects of that particular case, but that is not my idea of the last refuge of the oppressed. The Supreme Court's great service is to the individual."

SENATOR NEELY: "Was it not the purpose of the income tax law to relieve the oppressed poor people, who might have to pay more than a reasonable percentage of the taxes, by shifting the burden to the rich people and making them pay a tax on net incomes, which they had never been required to do?"

MR. SMITH: "To broaden the tax base. I think that that is true."

SENATOR NEELY: "And the object of that law really was to relieve the oppressed, was it not?"

MR. SMITH: "That is true."

SENATOR NEELY: "And then, when the Supreme Court held the law unconstitutional, it at least was not proving itself the last refuge of the oppressed there, was it?"

MR. SMITH: "Oh, I think so, because I think that the question went further than that. It was a question of State rights, which was involved there. It went beyond the simple question. It went into the question of the tariff and a few other things."

SENATOR NEELY: "Then as a lawyer trained, as I am certain you are, in the habits of logical thinking and clear speaking and deliberate expression, you think in that case then the Supreme Court really did prove itself the last refuge of the oppressed, in saying 'You can not levy this income tax, because one of us changed his mind, and he now thinks the law is unconstitutional?'"

MR. SMITH: "No, I do not think that that case has any relationship to the Bill of Rights."

SENATOR NEELY: "I am not talking about the Bill of Rights, I am just talking about your statement here."

MR. SMITH: "Nor to these particular things here. I think that so far as that goes, there were other refuges for the oppressed there, besides the income tax."

SENATOR NEELY: "Do you think that the Supreme Court proved itself the last refuge of the oppressed when the Court later held in spite of the fact that the amendment said in the clearest language possible that all income from whatever source should be subject to tax, and might be taxed by the Congress, in effect,—when the Court said: 'Yes, but you can't tax, for example, a million dollars worth of stock dividends that are paid to you, if they are paid through the instrumentality of stock, although you can sell them for $1,000,000 the day you receive them. Congress can not lay its hand on those stock dividends and tax them.' Do you think it was the refuge of the oppressed when it rendered that decision?"

MR. SMITH: "I do not think that the oppressed were there at that time. I think that they could have handled that situation by the levy on the direct earnings prior to distribution. I think that is what they should have done. The corporation should have paid the tax and been taxed in the highest brackets, and then they could have handed out all the stock that they wanted to. I think the oppressed had plenty of opportunity there by proper legislation. I do not think the Republican Senators would agree with it, but that is my own viewpoint."

SENATOR NEELY: "But Mr. Smith, that is an explanation of the way you think the effect of the decision of the Supreme Court could be debated. I am simply asking you about the naked proposition that you have made here, that the Supreme Court is the last refuge of the oppressed. To my mind, when the Supreme Court says that a million dollars worth of stock dividends can not be taxed, and as a natural result poor people, who live around the fellow that is getting that million dollars in stock dividends, have to pay his taxes for him, frankly I do not think that that is a case in which the Supreme Court is being a refuge for the oppressed. I think the Supreme Court, with that decision, joined in the oppression of the poor people. I just want to find out what you think about that."

MR. SMITH: "I do not think that decision involved the question of the oppressed. I think it involved a question of interpretation of words and language there. The effect of it may have been in some way to have prevented the poor from having less of a burden, but I think it is still a question of the broadening of the tax base, just as some people favor the sales tax, some do not. Some people think that is the easy way to relieve real estate. We always have to fight between different classes of taxpayers. I am not an expert on that. I let some of these other people do it. I represent municipal corporations, and of course they always think we ought to have more revenue."

SENATOR NEELY: "One more question: Do you think the Supreme Court proved itself the last refuge of the oppressed when it first held that in questions of monopoly—in other words, in dealing with the size of corporations and the extent of their business—the rule of reason should be applied, and when it came to deal with a labor union that worked, that was engaged in making hats, it held that the members of that labor union, engaged in its business wholly within a state, were responsible for going on a strike and boycotting the hat company, and indirectly interfering with its sale of hats in interstate commerce, and subjected them to heavy damages? Do you think that the Supreme Court was proving itself the last refuge of the oppressed in those cases?"

MR. SMITH: "Well, the Congress passed the law, and the Congress could have amended the law. It was the question of legislative policy at the time. They made no exceptions, and they should have done so. We are all bound by what the law is, unfortunately. In that particular case you have a situation as to whether the law applied generally. Congress did not see fit to include the exceptions, and are we to ask that the mistakes of Congress be corrected by the Supreme Court? I do not so understand that to be the judicial process. I think that they decide questions at issue."

SENATOR NEELY: "Well, now, you have suggested the duty of Congress, and if that is your only answer to the question, as to whether that was a case in which the Supreme Court proved itself the refuge of the oppressed, I want to ask you one more question. In the hatters' case to which I have referred, the Court held

in effect that the making of hats in the State of Connecticut was interstate commerce, and that the Court could penalize the makers of the hats, because they were engaged in interstate commerce. Now that is not the wording of the decision, but that is the net result of it. But in another case against the railroad company for damages, where a man was injured in working on an engine, the next trip of which was to be in interstate commerce, the Court said, 'That work is not interstate commerce.' In other words, when it affected the railroad company, it was not interstate commerce because it would have subjected the railroad company to damages. In the case of a few men making hats in a State and doing no act pertaining immediately to interstate commerce, the Court says, 'You are in interstate commerce—a boycott by you in the making of your hats here in this State is a matter of interstate commerce.' Did the Court in your opinion act in behalf of the oppressed in those two instances, or did it act in behalf of the railroad company, favoring the railroad company and discriminating against those day laborers who were earning their bread by making hats?"

SENATOR STEIWER: "Will the Senator permit an interruption at that point, before the question is answered?"

SENATOR NEELY: "Yes, but I want the witness to furnish the answer, Senator."

SENATOR STEIWER: "Yes, I will not interfere with that at all. I just want to make one brief statement, in one sentence. I have no purpose at all to engage in a debate with the Senator or anybody else, but I do not want the record to show that members of this Committee accept the statement that in the hatters' case the Court held the making of hats was interstate commerce."

SENATOR NEELY: "No, it was an interference, that boycott."

SENATOR STEIWER: "The Court has always held that manufacture is not interstate commerce, I think."

SENATOR NEELY: "That has been generally the holding of the Court, but in the hatters' case they did hold, as I recall it, that there was an interference with interstate commerce because the hats were going into interstate commerce."

SENATOR CONNALLY: "That is true. They held that they had no right to conspire to obstruct interstate commerce."

SENATOR NEELY: "Yes, that was it."

SENATOR CONNALLY: "That there had to be a conspiracy and acting in concert, interfering with the flow of commerce, as I understand it, based upon the language of the Sherman Act, which Congress had passed."

At this point Senators Neely, Connally, O'Mahoney and Austin engaged in a brief discussion of the commerce clause, at the conclusion of which Mr. Smith, referring to Senator Neely's original question about the Danbury Hatters' case, said that he would not undertake to answer the question in the manner it had been stated, because he felt that the case rested upon a great deal more than was stated in the question. Senator Connally thereupon took up the examination.

SENATOR CONNALLY: "Just one other question. The Senator has asked you about the Supreme Court being the refuge of the oppressed. Was it not the refuge of the oppressed in the parochial school case in which the Sisters of the Order were threatened with jail and imprisonment because they dared to have a school out in Oregon?"

MR. SMITH: "I think it was, sir, in that case?"

SENATOR CONNALLY: "Was it not a refuge for the oppressed in the West, when they had a law providing that they could not teach the German language in the schools, and when they threatened to put the teachers in jail?"

MR. SMITH: "That is my opinion, sir."

SENATOR CONNALLY: "Was it not the refuge of the oppressed in the De Jonge case recently from Oregon, in which a Communist had been convicted and sentenced to seven years in the penitentiary, in which the case had been affirmed by the Supreme Court of Oregon? Was it not the refuge of the oppressed when it upheld the picketing of labor unions who were oppressed and were striking, and they held picketing lawful?"

MR. SMITH: "That is my opinion. I think this, that the Supreme Court of the United States is responsible for the right of labor to strike. I think in the American Foundries case, the broad decision handed down by President Taft held that even though the men that were engaged in picketing were never employed by the company in which the strike was called, that was a right which could not be interfered with by the injunction of the Federal Court. From that day on labor marched to a new front. I think there have been cases that have protected them practically in that way, better than in any other."

SENATOR CONNALLY: "Was it not the last refuge of the oppressed when Milligan, with a rope around his neck, finally got into the Supreme Court and was freed from a military court, in which they were going to hang him?"

MR. SMITH: "That is my opinion, sir."

SENATOR CONNALLY: "Are not these cases just a few samples of what the Court has done, in its whole history, to maintain the rights of men under the first ten amendments to the Constitution?"

MR. SMITH: "That is my opinion, Senator."

Mr. Clarence J. Shearn, Jr., of New York City, stated that he had done the work which he wished to present in assisting Mr. Smith. He was not expressing any opinion and his presentation was to be wholly factual. He simply wanted to present some facts on the question of split decisions which has been discussed so much recently.

Mr. Shearn then read his prepared statement,

which was devoted entirely to an explanation of various graphs and tables which he had prepared. The significant thing which resulted from these studies, he declared, was the long line of unanimous decisions on questions involving the constitutionality of Federal and State statutes, and not the relatively small number of split decisions.

Senator Austin inquired if Mr. Shearn felt sure that his research work was properly set forth in the graphs, and whether his research was complete. Mr. Shearn replied that he had devoted a good deal of time to the study and the work was as accurately set forth as he was able to do it. He added that he believed the work was complete, although it might be that someone could pick out a State decision here and there and take issue with him as to whether a constitutional issue was really involved. He had gone through the cases carefully and had himself eliminated some which he had before.

THE RECORD ON "SPLIT DECISIONS"

For the purpose of the record, and at the request of SENATOR AUSTIN, MR. SHEARN described the charts which he was submitting along with his prepared statement. No. 1 showed Supreme Court decisions holding provisions of Federal enactments unconstitutional, from Feb. 1, 1934 to May 25, 1936. No. 2 showed decisions sustaining Federal enactments from May 28, 1934, through March 29, 1937. No. 3 showed decisions holding State enactments and attempted exercises of power unconstitutional, from 1933 to 1937. No. 4 gave the Supreme Court decisions sustaining the constitutionality of State enactments, and also exercises of power by the States, 1933 to 1937. He also described the eight graphs submitted in the same connection. The first two charts and several of the graphs are reproduced in this issue. Unfortunately space was lacking to give them all.

Mr. Shearn concluded his remarks with the following quotation from Mr. Charles Warren's book, "Congress, the Constitution and the Supreme Court":

"'Another false and misleading statement constantly made in speeches and newspaper articles is as to the alleged great number of 5-to-4 decisions holding acts of Congress unconstitutional. What are the actual facts? In Chapter 6, supra, it is shown that up to and including the year 1924 there had been only 8 such decisions.

"'Since 1924 and up to June 3, 1935, when the Supreme Court adjourned at the end of its October, 1934, Term, there have been only two other such decisions, one in a corporation income tax, and the other in the Railroad Pension Act, a 1934 case.'

"I might supplement that by saying there have been two since Mr. Warren made this statement, of course. He concludes by saying:

"'Thus it appears the whole complaint against the Court, that is to say, its 5-to-4 decisions in cases holding acts of Congress unconstitutional, rests on the records of only 10 such cases in 146 years.'"

MR. PAUL F. HANNAH, Secretary of the Junior Bar Conference of the American Bar Association, then presented a statement to the Committee on its behalf. SENATOR MAGILL inquired if the statement which he was about to make had received the approval of any organization. MR. HANNAH replied that his coming had received the approval of the Executive Council of the Conference, which is its governing body, and that the statement was based on correspondence which he had had with fellow members of the Conference.

SENATOR AUSTIN asked: "What is the Junior Bar Conference?" MR. HANNAH replied:

"The Junior Bar Conference, Senator Austin, is composed of all members of the American Bar Association under 36 years of age. It is the only national organization of younger members of the bar, and its membership of 4,200 is drawn from every State and nearly every community in the country. These young lawyers are at the point of their careers where all of you probably were at a like period of life—struggling to make a living at an honorable calling in an honorable way. The Conference has affiliated with it some 38 State and local junior bar organizations, which send delegates to its annual meetings. The Conference was created in 1935.

"Almost its first effort was the conduct of a national public speaking program in support of the Attorney General's anti-crime program. One of the most recent Conference activities has been assistance, through its public speaking committees, to the Red Cross in raising funds for relief of sufferers from the Ohio Valley flood disaster.

"Since February 5, the principal activity of the Conference has been the stimulation of full public discussion of the arguments for and against the Supreme Court proposal by the conduct of debates between Conference members and others before civic organizations, town hall groups, over the radio and in other ways. The purpose of this campaign is to acquaint the people, in an impartial way, with the facts pertaining to this vital issue, in order that the people may arrive at a sound, unbiased judgment.

"The Conference members voted in the American Bar Association referendum of which Mr. Smith has told you, and their votes were separately counted. Of the 2,625 ballots cast by Conference members, 2,113, or 80 percent voted against the President's plan as affecting the Supreme Court, and 1814, or 70 percent voted against adding new lower court judges to supplement those attaining the age of 70. The conference approved all the other features of the President's bill by substantial majorities."

MR. HANNAH then presented his statement, which is printed in full in this issue.

SPLIT DECISIONS IN THE SUPREME COURT IN INVALIDATING FEDERAL AND STATE ENACTMENTS AND ATTEMPTED EXERCISES OF POWER, 1933-1937

CLARENCE J. SHEARN, JR.
Member of the New York Bar

WE hear many people, whose sympathies are naturally with the social and economic objectives of the New Deal, express the opinion that an intolerable situation has arisen by reason of the fact that the judgment of a single Justice of the Supreme Court has been controlling in frustrating these objectives. It is not unnatural that this view should be widespread among those who have neither the time nor the inclination to go to the books, for it has been carefully fostered by the present administration, and even by officials of the Department of Justice. So tinged with partisanship have these emanations been, that it behooves anyone desirous of knowing the truth with respect to this notion, which is one of the pillars of the present attack on the Court, to examine the record, which beyond argument speaks for itself:

There have been, since the advent of the New Deal, 13 Federal Enactments held unconstitutional. One of these cases, *U. S. v. Constantine,* 296 U. S. 287, involved a Coolidge enactment, and should therefore be omitted from the discussion, leaving 12 cases. Out of these twelve, there were but 3 five to four decisions. One of these, *Ashton v. Cameron,* 298 U. S. 513, involved the Municipal Bankruptcy Act, which only by strained reasoning could be considered social legislation in furtherance of the New Deal objectives. This leaves two cases, *The Railroad v. Alton,* 295 U. S. 330, involving the Railroad Retirement Act, and *Carter v. The Carter Coal Co.,* 298 U. S. 238, involving the Guffey Coal Act. The situation caused by invalidation of the Railroad Retirement Act is already being remedied by effective action to attain the act's objectives within the Constitution. There was one six to three decision, *U. S. v. Butler,* 297 U. S. 1, invalidating the A. A. A., which act as amended was later invalidated in *Rickert v. Fontenot,* 297 U. S. 110 by a vote of nine to nothing. Save for a single dissent by Mr. Justice Cardozo in *Panama v. Ryan,* 293 U. S. 388, the so-called "hot oil" case, *all of the remaining decisions were unanimous.*

Let us now turn to State enactments and attempted exercises of powers held invalid in the same period. There are 54 such decisions. Of the 54, only 2 were five to four. One of these two was *Morehead v. Tipaldo,* 298 U. S. 587, invalidating the New York Minimum Wage Law, since corrected by the decision in the recent *Parrish* case, upholding a similar law in Washington, and thus removing that case from legitimate criticism. The other five to four decision was in *Great Northern Ry. v. Washington,* 81 Law. Ed. (Adv.) 350, which invalidated a tax imposed by Washington on utilities in order to defray the cost of regulating them insofar as the tax exceeded the reasonable cost of such regulation. This clearly was no frustration of any New Deal objective.

In the State field we then come to 9 six to three decisions. There are those who even go so far as to level criticism at six to three decisions, but as to their decisiveness let it be pointed out that the great mandate of the President we hear so much about was not that decisive; it was but 60.7% as against 39.3%. In any event, the criticism cannot apply, for we find that none of the 9 six to three cases involved New Deal legislation, with one partial and possible exception, in which a *portion* of the New York Milk Control Act was invalidated.

These nine cases are:

1. *Southern Ry. v. Virginia,* 290 U. S. 190, holding Virginia could not impose on a railway the cost of an overpass without a hearing.
2. *Georgia Ry. Co. v. Decatur,* 295 U. S. 165, holding similarly with respect to the costs of local improvements.
3. *Stewart Co. v. Lewis,* 294 U. S. 550, holding invalid a Kentucky chain store tax based on *gross receipts.*
4. *Senior v. Braden,* 295 U. S. 422, holding invalid a State tax on parcels of land, some within and some without the State, without allocation as to the parts within.
5. *West v. Chesapeake Tel. Co.,* 295 U. S. 662, setting aside a rate order for a telephone company.
6. *Schuylkill T. Co. v. Pa.,* 296 U. S. 113, holding invalid a Pa. tax on corporate shares which discriminated against U. S. bonds.
7. *Colgate v. Harvey,* 296 U. S. 404, holding invalid a certain Vermont tax.
8. *Great Northern Ry. v. Weeks,* 297 U. S. 135, holding invalid an assessment by North Dakota on property of an interstate railroad located in that state.
9. *Mayflower v. Ten Eyck,* 297 U. S. 266, holding invalid a provision of the N. Y. Milk Control Act.

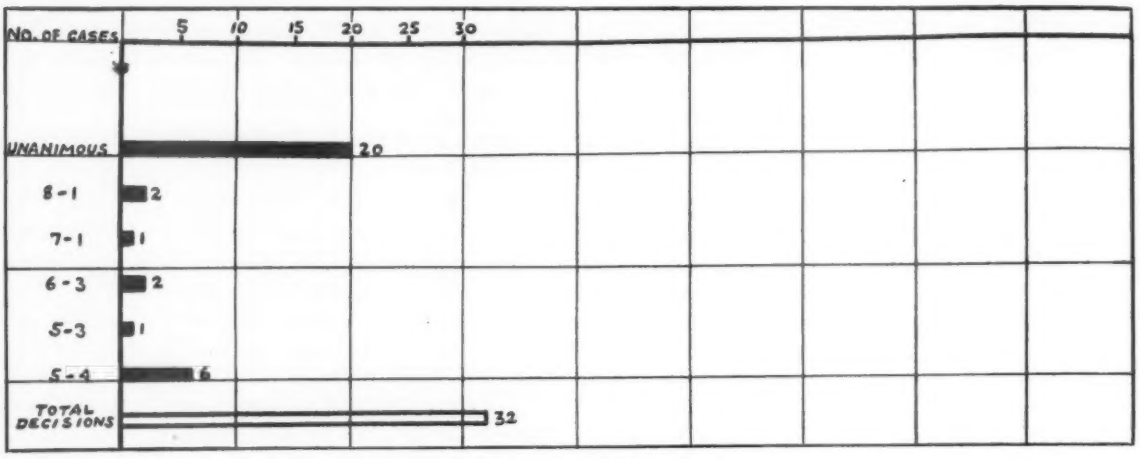
Of the remaining State decisions, there were: 2 six to two decisions, 3 seven to two decisions, 2 eight to one decisions.

Without enumerating these, they have been examined, and it can legitimately be said that none of them

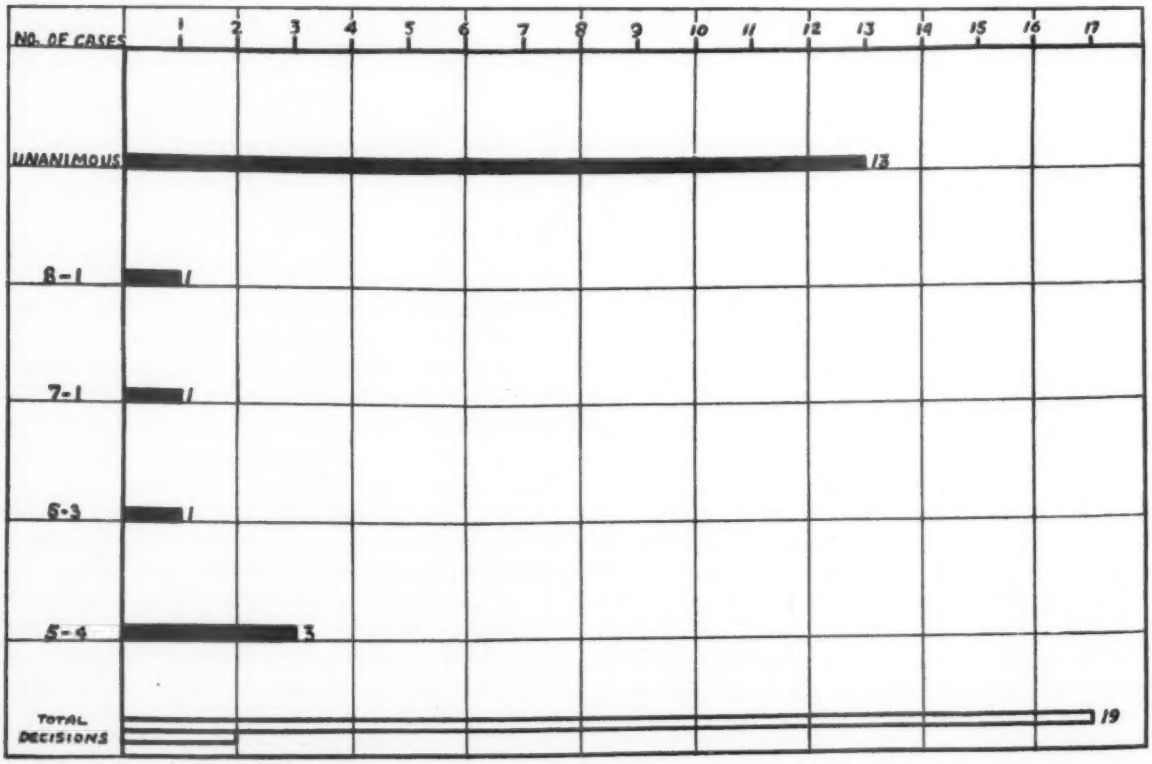
involved New Deal objectives, any more than the nine cases listed above. *All the rest were unanimous.*

Thus we see that in 67 decisions invalidating Federal and State enactments, and attempted exercises of power by the States, assuming that I am correct in saying the Tipaldo case is removed from criticism, there are only *two*[1] five to four decisions and *one* six to three decision which actually defeated New Deal objectives. It is not here intended to discuss the merits of these decisions, nor to point out more than casually that more patient and careful drafting of the acts and perhaps abler presentation of the government's cases might have avoided even these set-backs. But it must seem obvious that it is utterly unfair to attack the Court as an antiquated instrument of government in which the attitudes of a single Justice thwart the will of the people, or to describe the situation as did Asst. Attorney General Jackson before the Senate Judiciary Committee as one involving a persistent and dramatic split of opinion.

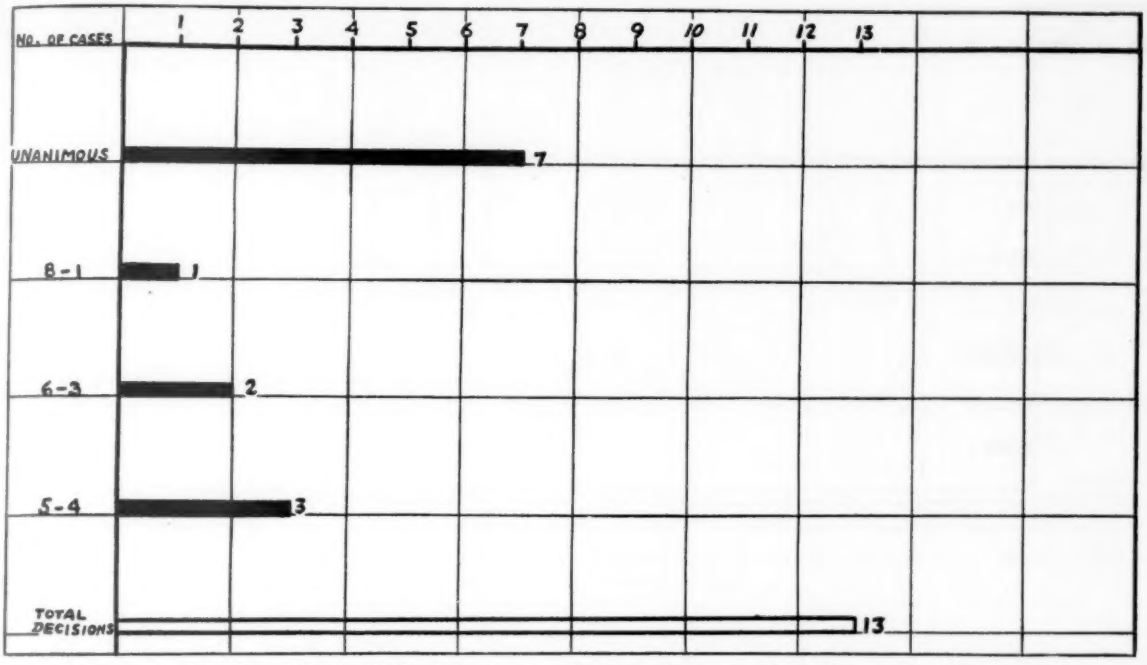
1. Considering the Tipaldo case as cured.



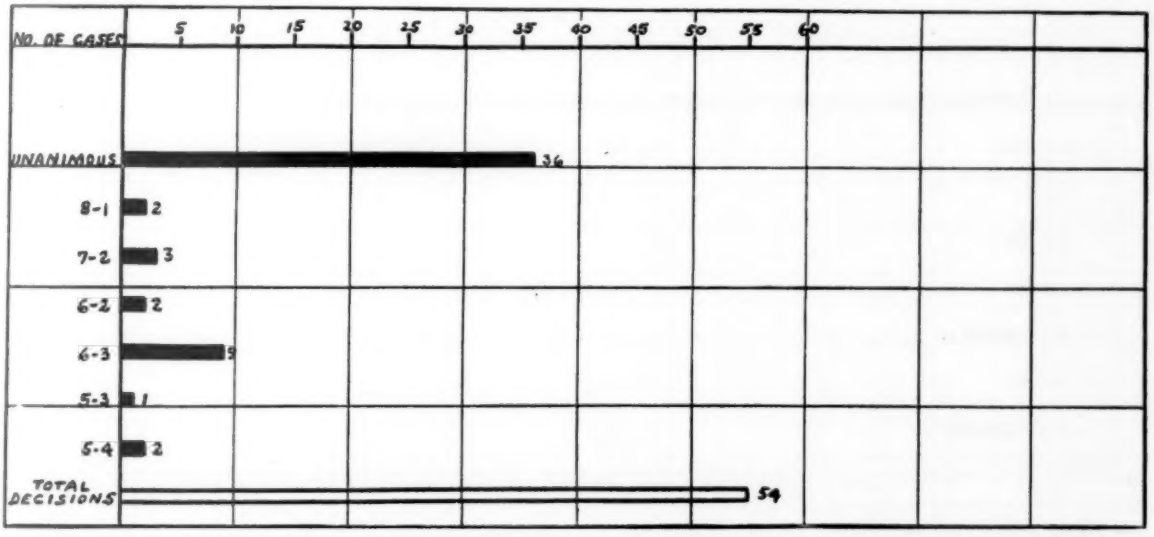
Total Supreme Court Decisions Passing on Constitutionality of Federal Enactments, 1933-1937 (Feb. 1, 1934-March 29, 1937).



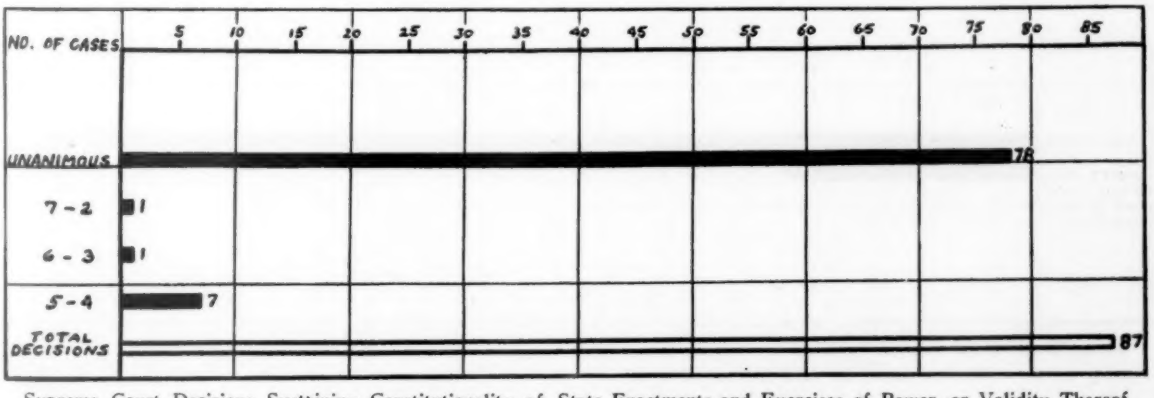
Supreme Court Decisions Holding Federal Enactments Constitutional (May 28, 1934-March 29, 1937).



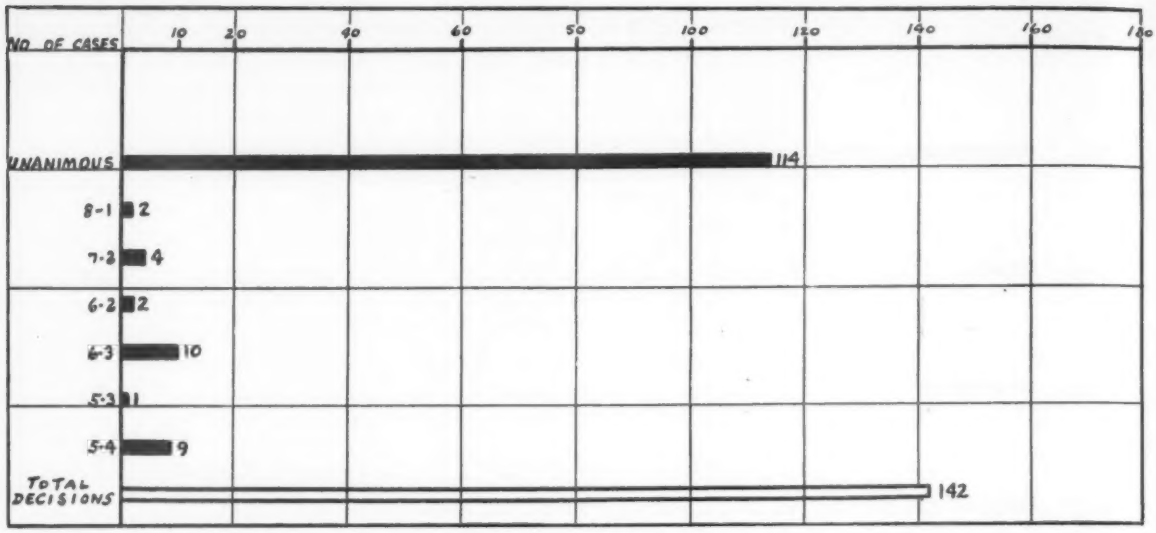
Supreme Court Decisions Holding Federal Enactments Unconstitutional, 1933-1937 (Feb. 1, 1934-May 25, 1936).



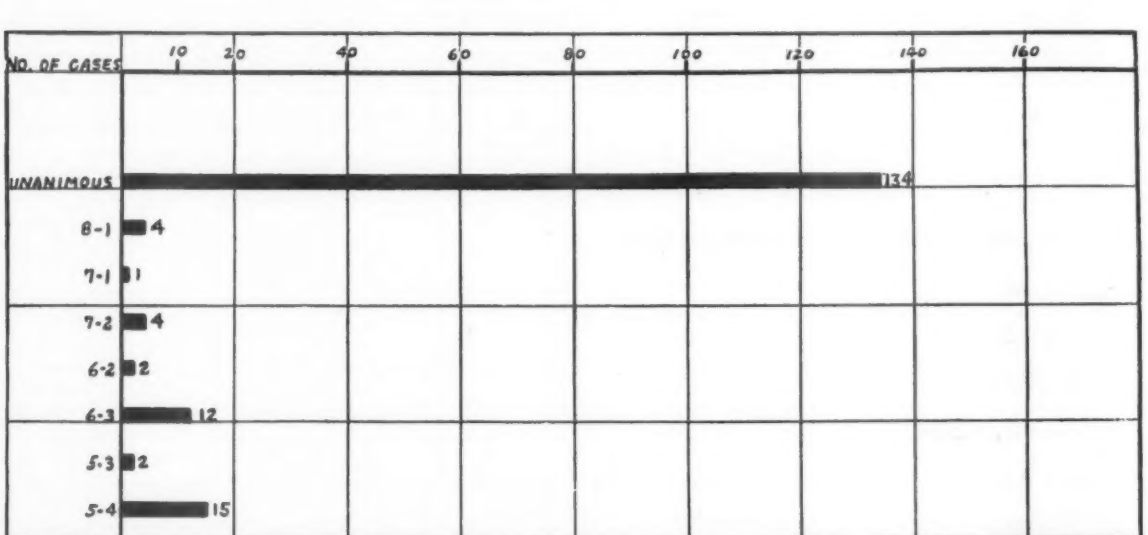
Supreme Court Decisions Holding Unconstitutional and Invalid State Enactments and Attempted Exercises of Power, 1933-1937 (Nov. 6, 1933-March 1, 1937).



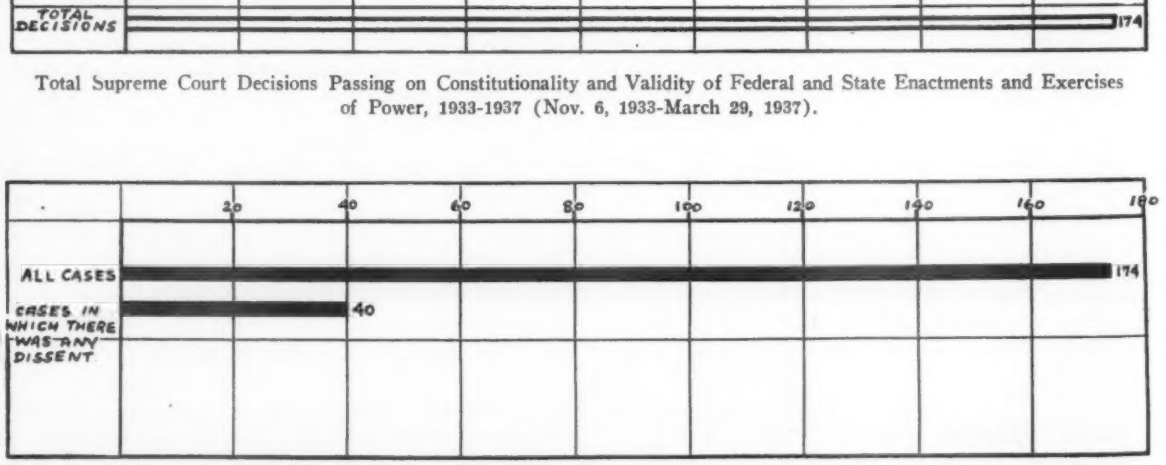
Supreme Court Decisions Sustaining Constitutionality of State Enactments and Exercises of Power, or Validity Thereof, 1933-37 (Nov. 6, 1933-March 24, 1937).



Total Supreme Court Decisions Passing on Constitutionality and Validity of State Enactments and Exercises of Power, 1933-37 (Nov. 6, 1933-March 29, 1937).



Total Supreme Court Decisions Passing on Constitutionality and Validity of Federal and State Enactments and Exercises of Power, 1933-1937 (Nov. 6, 1933-March 29, 1937).



Showing the Proportion of Decisions in Which There Was Any Dissent to All the Decisions of the Supreme Court Passing on the Constitutionality of Federal and State Enactments and Exercises of Power (Nov. 6, 1933-March 29, 1937).

Supreme Court Decisions Sustaining Federal Enactments as Constitutional 1934-1937

	NAME OF CASE CITATION	DATE OF DECISION	SUBJECT INVOLVED	MAJORITY (NameIndicates Writer of Majority Opinion)	VOTE	DISSENTERS	Average Age of Majority	Average Age of Minority	REMARKS
1.	Woodson v. Deutscher 292 U. S. 449	May 28, 1934	Trading with Enemy Act prohibition of suits to recover property taken thereunder is constitutional	Butler	9—0	None	68.9		
2.	Norman v. Baltimore 294 U. S. 240	Feb. 18, 1935	Gold clause stipulation in a private contract may be abrogated by the Congress	Hughes	5—4	McReynolds Van Devanter Sutherland Butler	67	72	
3.	Nortz v. The United States 294 U. S. 317	Feb. 18, 1935	Gold certificate holders may be required to accept legal tender currency equal to face amount thereof	Hughes	5—4	McReynolds Van Devanter Sutherland Butler	67	72	
4.	Continental v. Chicago 294 U. S. 648	April 1, 1935	Sec. 77 of 1933 Bankruptcy Act is constitutional as to railroads	Sutherland	8—0	None	68.4		Brandeis not sitting]
5.	Humphrey's Executor vs. The United States 295 U. S. 602	May 23, 1935	A statute limiting the causes for which the President can remove a member of the Federal Trade Commission is constitutional	Sutherland	9—0	None	70		McReynolds concurred on his opinion in Myers v. U. S., 272 U. S. 178
6.	Ashwander v. T. V. A. 297 U. S. 288	Feb. 17, 1936	Fed. Government has right to acquire transmission lines and power facilities and to dispose of power in the exercise of its admitted power over navigation	Hughes	8—1	McReynolds	69.7	74	Concurring opinion by
7.	Whitfield v. Ohio 297 U. S. 431	Mar. 2, 1936	Sustaining Hawes-Cooper Act with respect to convict made goods	Sutherland	9—0	None	70.2		Van Devanter, McReynolds and Stone concurred in the result
8.	Moore v. Texas 297 U. S. 101	Jan. 13, 1936	Validity of Cotton Control Act of 1934 sustained in suit arising out of refusal of carrier to accept goods for shipment on which tax required by Act was unpaid	Per Curiam	9—0	None	70.1		
9.	The United States v. Wood 299 U. S. 123	Dec. 7, 1936	Government employees are eligible for jury service in criminal proceedings in the District of Columbia	Hughes	5—3	McReynolds Sutherland Butler	71.6	72.6	Stone not sitting due to ill health
10.	American Tel. & T. v. U. S. 81 Law Ed. (Adv.) 116	Dec. 7, 1936	A Federal Communications Commission order under the 1934 statute to reform accounting system held valid	Cardozo	9—0	None	71.1		
11.	Duke v. Greenwood 81 Law Ed. (Adv.) 149	Dec. 14, 1936	The constitutionality of a Federal loan to a local power plant in competition with Duke Co. Not passed on owing to insufficiency of the record	Per Curiam	9—0	None	71.1		See p. 153 of opinion to effect that interest of haste should not obscure the substantial requirements of orderly procedure. No emergency requires same
12.	U. S. v. Curtiss-Wright 81 Law Ed. (Adv.) 166	Dec. 21, 1936	The delegation of power to the President to put in force prohibition of the sale of arms to foreign belligerents is constitutional	Sutherland	7—1	McReynolds	71.7	74	Broad Decision—Court said powers of President unlimited in foreign matters as it ante-dated the constitution. (Stone not sitting)
13.	Kentucky v. Illinois 81 Law Ed. (Adv.) 183	Jan. 4, 1937	Congress may prohibit or restrict the transportation of convict made goods in interstate commerce	Hughes	8—0	None	72		Stone not sitting
14.	Kuehner v. Irving 81 Law Ed. (Adv.) 248	Jan. 4, 1937	Section 77-B of National Bankruptcy Act limiting claims of landlord under indemnity clause of a lease to maximum of 3 years rental held valid	Roberts	7—0	None	70.8		Stone and Brandeis not sitting
15.	The United States v. Hudson 81 Law Ed. (Adv.) 261	Jan. 11, 1937	Tax on profits of sales of silver bullion is valid	Van Devanter	8—0	None	72		Stone not sitting
16.	Cummings v. Deutscher 81 Law Ed. (Adv.) 333	Feb. 1, 1937	A resolution under the trading with enemy act postponing delivery of property seized thereunder until certain obligations are met is constitutional	Butler	8—0	None	72.3		Roberts not sitting
17.	Holyoke Co. v. American P. Co. Advance Opinions No. 180 October Term, 1936	Mar. 1, 1937	Stipulation in lease for payment in gold equal to amount in dollars of gold coin of quality of 1874 or equivalent in currency may be abrogated by congress	Cardozo	5—4	McReynolds Van Devanter Sutherland Butler	69	74	
					129-17		Average age of majority: 70.17		Average age of Dissenters: 73.10

Supreme Court Decisions Holding Provisions of Federal Enactments Unconstitutional 1934-1937

	NAME OF CASE CITATION	DATE OF DECISION	SUBJECT INVOLVED	MAJORITY (NameIndicates Writer or Prevailing Opinion)	VOTE	DISSENTERS	Average Age of Majority	Average Age of Minority	REMARKS
1.	Booth v. The United States 291 U. S. 339	Feb. 1, 1934	Reduction of retired pay of Judges	Roberts	9—0	None	68.1		
2.	Lynch v. The United States 292 U. S. 571	June 4, 1934	Repeal of laws re yearly renewable term insurance	Brandeis	9—0	None	68.9		
3.	Panama v. Ryan 293 U. S. 388	Jan. 7, 1935	N. R. A. Oil Regulation	Hughes	8—1	Cardozo	69.7	64.3	
4.	Perry v. The United States 294 U. S. 330	Feb. 18, 1935	Abrogation of gold clause in Government obligations	Hughes	(5—4)* 8—0	McReynolds Van Devanter Sutherland Butler	67	72	Stone dissented from the constitutional holding
5.	Railroad v. Alton 295 U. S. 330	May 6, 1935	Railroad Retirement Act	Roberts	5—4	Hughes Brandeis Stone Cardozo	70.2	69.2	
6.	Schechter v. The United States 295 U. S. 495	May 27, 1935	N. R. A.	Hughes	9—0	None	69.9		
7.	Louisville v. Radford 295 U. S. 555	May 27, 1935	Frazier-Lemke Act	Brandeis	9—0	None	69.9		
8.	U. S. v. Constantine 296 U. S. 287	Dec. 9, 1935	Tax of $1,000 on liquor dealers violating state law and penalty for non-payment	Roberts	6—3	Cardozo Brandeis Stone	70.7	69	A Coolidge enactment
9.	Hopkins v. Cleary 296 U. S. 315	Dec. 9, 1935	Conversion of State Savings and Loan Associations into Federal	Cardozo	9—0	None	70.1		
10.	U. S. v. Butler 297 U. S. 1	Jan. 6, 1936	A. A. A.	Roberts	6—3	Stone Brandeis Cardozo	70.7	69	
11.	Richert v. Fontenot 297 U. S. 110	Jan. 13, 1936	A. A. A. Amendment	Roberts	9—0	None	70.1		
12.	Carter v. Carter Coal Co. 298 U. S. 238	May 18, 1936	Guffey Coal Act	Sutherland	5—4	Hughes Cardozo Brandeis Stone	71.8	70.2	Separate opinion by Hughes
13.	Ashton v. Cameron 298 U. S. 513	May 25, 1936	Municipal Bankruptcy Act	McReynolds	5—4	Hughes Cardozo Brandeis Stone	71.8	70.5	
					97—19		Average age of majority: 69.91		Average age of dissenters: 69.17

*While this case contained majority and minority opinions, it really represents a defeat of the Government's contentions 8-0. The majority ruled that the abrogation of the gold clause was illegal by four votes, Mr. Justice Stone abstaining on this point; by five votes they held plaintiff could not succeed, having shown no damage. The four votes of the minority agreed that the abrogation was illegal; they went beyond this in believing plaintiff was damaged.

JUNIOR BAR CONFERENCE'S VIEW OF SUPREME COURT PROPOSAL

PAUL F. HANNAH
Secretary, Junior Bar Conference; Member of Washington, D. C. Bar

MY appearance before the Committee today is in three capacities; as Secretary of the Junior Bar Conference; as a lawyer sworn to uphold and defend the Constitution of the United States; and as an American citizen.

As the representative of the Junior Bar Conference, I have come here to convey to you the views of the Conference membership on the Supreme Court proposal.

The Conference is composed of all members of the American Bar Association under thirty-six years of age. It is the only national organization of younger members of the bar, and its membership of 4,200 is drawn from every State and nearly every community. These young lawyers are at the point in their careers where all of you probably were at a like period of life—struggling to make a living at an honorable calling in an honorable way. The Conference has affiliated with it some 38 State and local Junior Bar organizations, which send delegates to its annual meetings.

Almost the first effort of the Conference after its creation was the conduct of a national public speaking program in support of the Attorney General's Anti-Crime Campaign. One of the most recent Conference activities has been assistance, through its public speaking committees, to the Red Cross in raising funds for relief of sufferers from the Ohio Valley flood disaster.

Since February 5, the principal activity of the Conference has been the stimulation of full public discussion of the arguments *for* and *against* the Supreme Court proposal by the conduct of debates between Conference members and others before civic organizations, "town hall" groups, over the radio and in other ways. The purpose of this campaign is to acquaint the people, in an impartial way, with the facts pertaining to this vital issue, in order that the people may arrive at a sound, unbiased judgment.

The Conference members voted in the American Bar Association referendum of which Mr. Smith has told you, and their votes were separately counted. Of the 2,625 ballots cast by Conference members, 2,113, or 80% voted against the President's plan as affecting the Supreme Court, and 1,814 or 70% voted against adding new lower court judges to supplement those attaining the age of seventy. The Conference approved all the other features of the President's bill by substantial majorities. Attached to my statement is an analysis of the Conference votes, and I ask that it be made a part of the record herein.

Why is it that eighty percent of the young lawyers who voted in the referendum are against the President's plan? Many members of the Conference have written to me, as Secretary, expressing frankly their reasoning; and I deem it a privilege briefly to summarize what I believe to be the viewpoint I share with the vast majority of my fellow members of the bar.

We young lawyers, by virtue of our greater life expectancy, have much more of a stake in the future of this country than have you gentlemen, or the President. Our futures are still ahead of us. We are deeply concerned in having the next thirty years that represent the fruitful period of our lives as happy, as free from great internal strife, as the last thirty years have been. We want to be certain that those liberties which you have enjoyed are going to be available to us and to our children.

We have come to manhood and womanhood in a period when hurricanes of dictatorship have tumbled democratic structures all over the world and swept from the peoples of many lands the last vestiges of liberty. Our early maturity has witnessed in many countries class pitted against class in bloody struggles that have brought those countries to the verge of the Dark Ages and to economic chaos. On the other hand, we have seen, during the last five years, under the leadership of one whom I regard as one of the greatest of Presidents, social and economic progress accomplished without abandonment of the democratic process, without change in our form of government or destruction of our liberties. This contrast and example convince us that the only road to the abundant life is the road charted and laid out by the framers of the Constitution over which we have been successfully marching for one hundred and fifty years.

We, therefore, regard any proposal affecting or asserted to affect our Constitutional system from this point of view: Will it bring permanent and certain benefits outweighing in value the dangers it may possess? We have regarded the Supreme Court proposal from this viewpoint—weighing its advantages against its disadvantages as judicially as we can. And in the judgment of 80% of us, the price we may have to pay for the few benefits from the bill is too great to warrant its passage.

A. ARGUMENTS FOR THE PLAN

The main arguments advanced for the plan are four.

1. RELIEF OF COURT CONGESTION

First, it is said that the addition of new judges will relieve Court congestion. Assuming, contrary to my

own understanding of the facts, that Court congestion exists, this argument is unsound. Mr. Justice Story answered it in a letter dated March 15, 1838, written shortly after the Court had been increased from 7 to 9. Mr. Justice Story, writing of the effect of the increase, said:

"We made very slow progress, and did less in the same time than I ever knew. The addition to our number has most sensibly affected our facility as well as the rapidity of doing business. . . . We found ourselves often involved in long and very tedious debates. I verily believe, that if there were 12 judges we should do no business at all or at least very little."

2. The Infusion of "New Blood"

Secondly, it is said that the proposal, if adopted, will infuse "new blood" into the Court. If "new blood" is desirable at the moment—and the last few weeks have shown the contrary to be true—"new blood" should be equally desirable in the future. But the Supreme Court proposal permits only one infusion. Thereafter, only death or retirement, as under our present system, will make it possible to add new members. The plan is, therefore, no permanent cure, if one be needed. It is but a temporary expedient, and much less effective to accomplish this purpose than Senator Burke's proposed constitutional amendment for compulsory retirement at the age of seventy-five.

3. The Split Decision "Menace"

A third argument advanced for the plan is that it will prevent "split" decisions. Much hue and cry has been raised on this point since the Wagner Act decisions. The dangers and difficulties of split decisions have been very much exaggerated. Since 1933 there have been only eleven 5 to 4 decisions out of 35 cases involving the constitutionality of Federal enactments. Eight or 72% of such decisions have been decided in favor of the Government.

The plan, however, gives no assurance of banning close decisions. An eight to seven split in which one man holds the power is as possible under the President's plan as under the present situation. If it is desirable to avoid such decisions the President's plan has neither the certainty nor the efficacy of Senator O'Mahoney's proposed amendment.

4. A New Constitutional Interpretation

Fourthly, the President's plan is supposed to result in a judicial view of the Constitution consonant with the spirit of the times. This argument places proponents upon the horns of a dilemma. If new Justices are to be selected on legal merit alone, as Justices should be, there is no assurance that their views will coincide any more closely with those claiming to represent the spirit of the times than the views of some of the present Justices coincide with the views of the Presidents who appointed them. On the other hand, if Justices be selected because of their constitutional views, they will be "the king's men," with all that that implies. Neither alternative should be pleasing either to the Congress or to the people.

5. Summary of Arguments for Supreme Court Plan

In summary, when this plan, and the arguments for it, are closely analyzed, we must conclude that the chances of the plan's accomplishing its avowed purposes are at best slight and illusory. Let us now consider briefly the plan's dangers.

B. OBJECTIONS TO SUPREME COURT PLAN

1. The Plan Endangers the Independence of the Judiciary

The record in this hearing clearly demonstrates that the Supreme Court plan may well lead to the destruction of judicial independence. The point needs no further laboring. Every constitutional writer before and since Story has realized that any President and Congress could bring the Supreme Court to subservience by increasing its membership; and further, that at any time the decisions of the Court become unpopular, the urge to pack it would tax the self-restraint of a President and Congress. The absence of a constitutional provision fixing the size of the Court is the Achilles' heel of our system of separate and coordinate powers.

A principal function of the Supreme Court is to protect minorities from unconstitutional actions of majorities. It is bound from time to time to be unpopular because it must, on occasion, thwart the majority will. Hence the urge to pack the Court will recur. And if, today, we have the spectacle of prominent persons citing, erroneously, Grant's action as a precedent for increasing the Court at this time, how much more effectively may another Congress and President, less devoted to public welfare and our liberties, cite a great liberal President and Congress as justification for controlling the Court against the best interests of the American people?

Even if, as many believe to be the case, the present plan does not make the Court merely the judicial echo of legislative fiat, certainly it extends a cordial invitation for such a result in the future.

It is not necessary, of course, to stress to a Judiciary Committee the facts, demonstrated time and again by history, that Bills of Rights and Magna Chartas are but scraps of paper unless there is an independent, fearless and uncontrolled judiciary to enforce their guarantees.

An independent judiciary is, of course, also essential to the maintenance of a constitutional system, such as ours. In no other way can there be any practical restraint upon acts of government, or any practical protection of the individual citizen.

This is not only the judgment of youngsters at the bar; it is the judgment of those who, through suffering, knew the ravages of tyranny and who determined in setting up our Government after the

Revolution, that they should not be repeated, whether the despotism be monarchical or elective. As Thomas Jefferson said in his Notes on the State of Virginia:

". . . An elective despotism was not the government we fought for; but one which should not only be founded on free principles, but in which the powers of government should be so divided and balanced among several bodies of magistracy, as that no one could transcend their legal limits, without being effectually checked and restrained by the others. For this reason, that convention which passed the ordinance of government, laid its foundation on this basis, that the legislative, executive, and judiciary departments, should be separate and distinct, so that no person should exercise the powers of more than one of them at the same time. . . ."

The Supreme Court bill opens the gate to a destruction of the independence of the Judiciary, and, by the same token, to the destruction of our constitutional system. Great must be the benefits to flow from a measure exposing us to such dangers. This bill, however, offers no such benefits.

2. THE BILL, IF EFFECTIVE, WILL AMEND THE CONSTITUTION IN A MANNER NOT PROVIDED FOR IN THE CONSTITUTION

The plain purpose of this bill is to force the amendment by judicial interpretation of the Constitution of the United States as it is now interpreted.

The Constitution is a grant of power from a sovereign people to their government. Changes in that grant are to be made, the Constitution provides, not by the Congress or the President, but by the people.

Therefore, this bill, we believe, has the intention and object of doing that which the people alone are entitled to do. To that extent, it violates the Constitution.

Rights, once lost, are not easily regained. If the people do not, in this instance, retain the right to pass upon amendments to the Constitution,—and if you, as their agents, do not protect this right,—the right may well be gone forever, with a controlled court sitting in the place of the people as a continuous constitutional convention to ratify amendments proposed, in the form of legislative enactments by a Congress.

No merit in the Supreme Court plan outweighs this deprivation of the people's right to change the organic law, nor compensates for the dangers to those rights the plan contains.

3. THE PROPOSED PLAN MAY BRING THE JUDICIARY IN DISREPUTE AND DESTROY CONFIDENCE IN IT

In every period in history when there has been the rumor that the Supreme Court might be controlled by the Executive, confidence in the Court has been shaken. The reversal of the legal tender decision as a result of two new appointments by President Grant for a considerable period of time weakened the Court in the respect and confidence of the country at large.

If two appointments, filling vacancies created before the legal tender cases were argued, can bring the Court into disrepute, what may be said of six appointments, made, not to fill vacancies, but to amend, without the people's consent, the Constitution? If the new appointees decide with the Government, they will be called "king's men." If they decide against the Government, they will be said to have betrayed the people. Can a tribunal so constituted, which has no other power but that afforded by the respect and good will of the public, long retain any power at all?

It must be remembered that only a small portion of the Court's business deals with constitutional problems. It is the final arbiter of conflicts between circuit courts; the final interpreter of statutes; the author of much commercial law, and the settler of many disputes between private litigants. Diminution of the respect for the Court may well create a spirit of rebellion against its decisions, uneasiness, confusion and doubt inimical to an ordered society. Such disrespect may extend even to open defiance of the Court by defeated litigants.

A measure creating such a possibility should be adopted only if no other way can be found to realize the benefits sought. Other ways do exist.

4. SUMMARY OF OBJECTIONS TO SUPREME COURT PLAN

In summary, the Supreme Court plan exposes the independence of the judiciary to destruction; it seeks to amend the Constitution without the consent of the people; it threatens to destroy the respect for the Court without which the Court cannot exist. Each one of these defects far outweigh, in our minds, the illusory advantages promised from the plan.

C. A CONSTITUTIONAL AMENDMENT CAN BE OBTAINED

It is argued that, despite its deficiencies, the Supreme Court plan is the best that can be obtained at this time. This argument is based upon the theory that a constitutional amendment cannot be had. Such a "defeatist" attitude smacks more of the Liberty League than of this Administration. It is so undemocratic in essence as to be unworthy of persons claiming to be members of the Democratic party. Anyone who has the slightest faith in the people knows that if a constitutional amendment is needed, and sound reasons for the need exist, the people, through constitutional conventions, can ratify it in less time than it may take to pass this bill.

D. CONCLUSION.

What you and the other members of the Senate do here is of vital importance to the generation to which I belong and to future generations. Probably no decision which the Supreme Court of the United States ever rendered is as important as the decision *you* must make.

The Supreme Court controls neither the purse nor the sword. The dignity demanded from the Justices

(*Continued on page* 394)

MEMBERS AND NON-MEMBERS OF AMERICAN BAR ASSOCIATION TAKE SAME STAND ON COURT ISSUES

Results of Recent Referenda on Court Proposals Compared—Total Vote of Non-Members about Four to One in Opposition to Supreme Court Plan—Evidence of Fair and Discriminating Consideration Given to Proposals by Lawyers in and Outside of the Association—Significance of Poll of Non-Members—Balloting as to Other Federal Courts—Practical Usefulness of Referendum Results—Comparison with State Bar Votes—Conclusions for the Association and the Profession—After the Referendum, What?—Tabulation of Votes

By William L. Ransom
Past President of American Bar Association

IN every State and the District of Columbia, the lawyers voting in the American Bar Association's poll of the legal profession have registered emphatic disapproval of the proposed increase in the number of members of the Supreme Court of the United States, and have voted their views upon other pending proposals as to the Federal Courts. More than 72,000 lawyers throughout the country, of whom about 52,000 are not members of the Association, voted upon the Court issues. In no State was the proposed increase in the Supreme Court approved by a majority of either the non-members or the members taking part in the referendum; and the non-members approved the same proposals, and rejected the same proposals, as did the members of the Association. Every lawyer in the continental United States, on an available list, was given an opportunity to vote upon the submitted questions.

The detailed results, by States, of the poll of members of the Association, were published in the April issue of The Journal. The detailed results of the non-member and total poll are published in this issue.

The total vote on the Supreme Court issue, by members and non-members of the Association who cast secret ballots by mail, was 14,333 (20.3 per cent) for the proposal and 56,153 (79.7 per cent) in opposition. The non-members voted 11,770 (22.7 per cent) in favor and 40,021 (77.3 per cent) in opposition. The ratio of disapproval was thus not as high among the non-members as among the members, but the total vote was about four to one in opposition. In some twenty-four States, the non-members voted against the proposal in a higher ratio than eighty per cent to twenty per cent. The four to one ratio prevailing in the votes cast by about 72,000 members and non-members of the Association is also the ratio obtained in the votes cast by members of the National Junior Bar Conference, composed of lawyers under 36 years of age.

The fair and discriminating consideration which members of the Bar, in and outside of the Association, gave to the pending proposals, is evidenced by the fact that, by non-members and members alike, four of the six proposals made by The President's Message of February 5, 1937, were approved by definite majorities, although some States voted in opposition, whereas the two proposals which menace the independence of the Courts were disapproved by impressive and decisive majorities.

The closest vote cast by non-members of the American Bar Association in any State on the Supreme Court issue was in Mississippi, where a special meeting of the State Bar, with 266 lawyers in attendance, had approved the proposed increase in the membership of that Court, by a vote of 165 in favor and 101 against. When 461 lawyers of that State came to vote on the question by secret ballot by mail, the poll was 190 in favor of the proposal and 271 against. Non-members voted 160 for and 173 against; members, 30 for and 98 against.

Mississippi was the only State whose non-member lawyers voted to approve the proposed increase in the Circuit and District Courts, but members voted 37 for and 91 against that proposal, making the total vote of the State's lawyers 206 for and 251 against. On the other hand, a majority of Mississippi lawyers cast opposing votes on Question Four, and a majority of Association members in Mississippi voted no on Question Five.

SIGNIFICANCE OF THE POLL OF NON-MEMBERS

In March, the attitude and action of the Association on the pending proposals were determined by a referendum vote of its members by mail ballot, in which more than 19,000 members took part. In view of the

paramount importance of the issues as to the independence of the Federal Courts, the Association wished to give an opportunity for a like expression of views also to lawyers who are not members of the Association. The referendum to non-members was accordingly conducted in like manner and with the same safeguards assuring secrecy, under the supervision of the Association's Board of Elections, of which the Chairman is the Honorable Edward T. Fairchild of the Supreme Court of Wisconsin.

In no instance would the result of the balloting be different, as to action for or against the various submitted proposals, if the votes of the about 72,000 lawyers were taken as the basis, or if the votes of the about 52,000 non-members were taken as the basis, or if the votes only of Association members were taken as a basis. On each one of the six proposals separately voted on, the non-members voted the same way as did the members of the Association. In some instances, the non-members manifested what may be regarded as a more conservative attitude than did the members of the Association.

Irrespective of what the results of the balloting might prove to be, it was an important useful step forward, for the American Bar Association to obtain the opinion of the members of the profession outside its own ranks, upon the pending proposals as to the Federal Courts. This was plainly the way in which the Association could perform in a thoroughly democratic manner its high duty to the public upon such issues, and at the same time make a significant contribution to the current discussion. The public was entitled to know the reasoned views of its lawyers as to the proposals, and this need for a representative expression of the opinion of the profession of the law was not limited by the incident of membership in the American Bar Association.

MEMBERS AND NON-MEMBERS ARE IN SUBSTANTIAL ACCORD ON COURT ISSUES

The polling of non-members has taken place. Every lawyer on an available list has been given an opportunity to vote his views. As was expected, there are some variances in ratios, in some localities; but the results, in the whole country and in each State, are the same. In no State is the proposed increase in the Supreme Court approved by either members or non-members; and no proposal approved by the votes of the members of the Association was disapproved by the non-members.

This should end the assertion or assumption, by some, that members of the Association think and act differently from lawyers who are not members, upon matters affecting the Courts and the administration of justice. The over-all vote of four to one in opposition to the Supreme Court proposal is significant and demonstrative, but it should be noted that in the balloting by non-members, eighty per cent or more of the vote in the following States was in opposition on the Supreme Court issue: Colorado, Connecticut, Indiana, Iowa, Kansas, Maine, Maryland, Massachusetts, Michigan, Minnesota, Montana, Nebraska, New Hampshire, New Mexico, North Dakota, Ohio, Oregon, Rhode Island, South Dakota, Utah, Vermont, Washington, West Virginia and Wyoming.

No sectional or partisan considerations controlled the voting in the referendum, among non-members or members. In virtually all parts of the United States, the results were significantly similar, among non-members as well as among members. Generally speaking, the opposition to impairing the independent, non-political functioning of the Courts of the United States was strongest in the smaller States and in the States containing none of the larger cities.

THE BALLOTING AS TO OTHER FEDERAL COURTS

The poll of non-members as to the proposal with respect to the Circuit Courts of Appeal, District Courts, etc., showed the same factors to be operative as were disclosed by the poll of members. In every State, the total vote of its lawyers disapproved the proposal as to these Courts; in every State except Mississippi, a majority of the non-members voting were in opposition. In comparison to the total vote cast by the two groups, the number of non-members opposing the Supreme Court proposal but favoring it as to the other Courts was smaller than among the members.

In the latter poll, 1485 fewer votes were polled for the Supreme Court proposal than for that as to the other Courts. Among the much larger number of non-members voting, 2715 fewer votes were polled for the Supreme Court proposal than for that as to the other Courts. In the combined vote, some 4200 lawyers out of about 72,000 were apparently willing to approve The President's proposal as to the lower Courts but not as to the Supreme Court. This margin of greater support for the proposal as to the lower Courts was manifest throughout the country, among members and non-members, but was not sufficient to carry any State to support of the proposal. Of the margin, 677 votes came from New York and 432 from Illinois. The total vote on the proposal as to the lower Courts was 18,533 for and 51,156 against—a ratio of slightly less than three to one in opposition.

THE VOTE UPON THE OTHER SUBMITTED PROPOSALS

That members of the Bar, whether members of the American Bar Association or not, are not antagonistic to constructive proposals for improving the administration of justice and for expediting the determination of controversies between citizens and government as to constitutional right, is shown clearly by the results of the poll upon the four questions which did not involve increase in the number of judges on the basis proposed. As to these four proposals of The President's Message of February 5, 1937, members

and non-members voted approval, generally in about the same ratios.

As to each of these four proposals, substantial questions have been raised by some local Bar Associations and others, as to the inherent fairness and desirability of the recommended change. Nevertheless, the lawyers outside and inside the American Bar Association voted approval of these changes, although there was a strong minority in opposition in each instance. The preponderant feeling evidently was that the Congress and The President would be likely to eliminate any objectionable features of these proposals as first made, and that the Bar could afford to support reasoned suggestions of change, so long as the independence of the Courts is not thereby endangered.

Looking at the results of the balloting on all four proposals, the figures are open to the interpretation that non-members are less ready than American Bar Association members to approve and accept these changes. The discussions which have taken place, in many local and State Bar organizations and among members of the Bar, as to these four proposals, have been over-shadowed by the Supreme Court issue, but have begun to have effects which appear to be manifest in the later poll of non-members. In any event, there are some interesting variances.

For example: The proposal indicated in Question Two, as to assignments of Circuit and District Judges by the Chief Justice to duties outside their district, was approved by members of the Association in every State except North Dakota, Maine (where the vote was a tie), and South Dakota. In stating this proposal for the non-member poll, the only instance of variance from the wording submitted to members took place. The words "hereafter appointed" were inserted, to conform to the bill, whereas the wording submitted to members referred to the accompanying text of the bill but did not carry these limiting words into the question. The lawyers who are not members of the Association disapproved this proposal in Colorado, Indiana, Iowa, Kansas, Kentucky, Maine, Missouri, Nebraska, North Dakota, Utah, Vermont and West Virginia, with the vote in Wyoming a tie. In several other States, the margin of approval was close—much closer than in the vote by members. The total vote went against the proposal in Indiana, Kansas, Maine, Missouri, Nebraska, North Dakota, South Dakota, Vermont and West Virginia. Unquestionably, this strong development of doubt as to this proposal in its present form should lead to its close scrutiny by those responsible for the final form of any legislation on this subject.

On Question Three, as to creating the administrative office of proctor as an adjunct of the Courts of the United States, the non-members in many States showed themselves definitely more doubtful of the wisdom of such a project than did the members of the Association. In the voting by members, Colorado, Iowa, Kansas, Maine, Nebraska, North Dakota, Oregon, and South Dakota, opposed the proposal. The non-members voted the same way in each of these States, excepting North Dakota, and were jointed by Idaho, Indiana, Kentucky, Missouri, New Hampshire, Utah, West Virginia and Wyoming, in which the Association members had approved the creation of a proctor. This made a total of fifteen States in which the non-members disapproved a proctor. In eleven States (Colorado, Indiana, Iowa, Kansas, Maine, Missouri, Nebraska, Oregon, South Dakota, West Virginia, and Wyoming) the total vote of the lawyers saw no need for a proctor in the place of the present Judicial Conference.

As on practically every issue involving changes affecting the Federal Courts, the lawyers of the smaller States, those which do not contain the larger cities, showed the greater disposition to oppose the changes, which were nevertheless carried to approval by the votes of the larger States. Examination of the list of States whose lawyers voted against this proposal leaves no ground for believing that partisanship or sectional views were responsible for this result. The "country lawyer," irrespective of party or locality, does not want the American judicial system changed for light reasons.

On Question Four, as to the right of intervention by the Attorney-General, the total affirmative vote was larger than on the two preceding proposals, but some new States appeared in opposition. Among members of the Association, Idaho, Kansas, Maine, Mississippi, New Mexico, Utah, Vermont, and Washington voted against the proposal. Among non-members, the States in opposition were Kansas and Maine. On the combined vote, the States in opposition were Idaho, Kansas, Maine, Mississippi, Utah, and Vermont—an alignment which it would be hard to explain on sectional or partisan grounds.

On Question Five, as to giving to the Attorney-General (but not to other parties to the litigation), the right of direct appeal in constitutional cases, the largest total affirmative vote was polled. Among members of the Association, only Maine and Mississippi voted in the negative. Among non-members, Idaho and Maine were in opposition. The question whether the right of direct appeal in constitutional cases should in fairness be given also to other parties to a suit, if given to the intervening Attorney-General, may not be deemed answered by the vote of lawyers in favor of giving the right to the Attorney-General.

PRACTICAL USEFULNESS OF THE REFERENDUM RESULTS

Although individual lawyers and teachers of law appeared from time to time at the hearings held by the Judiciary Committee of the Senate, the American Bar Association wisely withheld its presentation until the results of the poll of non-members of the Association could be stated, along with the votes of Association members. The Association desired to acquaint the Committee and the Congress with the expressed views

of lawyers throughout the country, irrespective of membership in the Association.

The tabulations of the member and non-member polls, as placed before the Senate Committee by Sylvester C. Smith, Jr., of New Jersey, Chairman of the Association's Special Committee, were the Association's distinctive contribution to the hearings before the Judiciary Committee. The fact that in every State and the District of Columbia, members and non-members alike voted opposition to the Supreme Court proposal, with eighty per cent of the votes in opposition, whereas the same lawyers voted definitely in favor of four other proposals submitted by The President, was impressive and unanswered. The absence of majority support for the proposal, among either members or non-members in any State, and the overwhelming disapproval voted by both non-members and members in many of the States, showed that lawyers of all political parties and all localities are in opposition. The further fact that throughout the country, the members of the Junior Bar Conference voted against the Supreme Court proposal in the ratio of eighty per cent to twenty per cent—the same ratio as resulted from the total vote of members and non-members of the Association—refuted the idea that the opposition came only from older, conservative lawyers. Members of the profession under 36 years of age voted side by side with their seniors and in approximately the same ratio, against the Supreme Court proposal.

In addition to the Board of Elections' tabulations of the two polls conducted by the American Bar Association, the Special Committee presented also a report of the numerous polls conducted by local and State Bar Associations, and of the votes taken by local and State Bar Association meetings, throughout the country. These independent polls of the opinion of the Bar in the various localities were most impressive. As a rule, these independent local votes showed a higher ratio of opposition to the Supreme Court proposal than did the poll conducted by the American Bar Association. The fact was commented on, at the hearings, that aside from the American Bar Association and many of its affiliated State and local Bar Associations, no organization undertaking to speak for the legal profession has presented to the Committee the results of a poll of its membership upon the pending proposals, much less a Nation-wide poll of lawyers in which every member of the profession was given an opportunity to vote.

The American Bar Association received its mandate on the Court issues from the rank and file of its members in every State, reinforced by the votes of non-members in every State. With such a mandate, the representatives of the Association urged that the Courts have been the great bulwark and safeguard of the rights of the people, and that only the people should decide whether drastic changes should be made in the Courts. Both sides in the present controversy were urged to heed and trust the people, and to place the pending proposals in such form that their salient features could and would be submitted to the determination.

COMPARISON WITH RESULTS OF STATE BAR REFERENDA

Among the State integrated Bars, of which every lawyer in the State is automatically a voting member, the mail-ballot referenda conducted by the State Bar organizations upon the proposal as to the Supreme Court furnish interesting comparisons with the American Bar Association polls in those States:

	State Bar Poll		American Bar Association Poll	
	For	Against	For	Against
Alabama	313	846	161	435
Michigan	990	3,405	414	1,867
Montana	82	303	68	254
North Dakota	79	349	51	243
Oregon	266	1,383	113	672
South Dakota	82	446	60	353
Utah	87	504	46	281
Washington	370	1,601	205	1,056
Wyoming	13	115	20	110
Totals for integrated State Bars	2,282	8,952	1,138	5,271

In the total vote in the polls conducted by the State integrated Bars, the ratio was nearly four to one in opposition to the proposal to re-make the Supreme Court. In the American Bar Association polls in the same States, the total vote was in the ratio of 4½ to one in opposition.

Among the (voluntary) State Bar Associations, comparisons with the results of the American Bar Association polls in those States are:

	State Bar Association Poll		American Bar Association Poll	
	For	Against	For	Against
Connecticut	44	366	126	631
Delaware	4	70	21	94
Illinois	317	2,062	1,182	5,275
Indiana	590	2,149	321	1,540
Louisiana	59	387	159	543
Maryland	70	381	196	888
Massachusetts	47	676	302	2,213
Minnesota	454	1,744	265	1,341
New Hampshire	10	144	20	171
New York	289	2,417	2,473	8,315
Ohio	354	2,080	741	3,634
Pennsylvania	764	3,638	750	3,182
Rhode Island	18	264	34	288
South Carolina	37	86	107	236
Texas	369	1,336	704	2,032
Vermont	33	216	14	170
Virginia	51	230	254	831
West Virginia	117	400	111	561
Totals for States in which polls were conducted by voluntary State Bar Associations	3,627	18,646	7,780	31,945
Totals for States in which polls were conducted by State integrated Bars	2,282	8,952	1,138	5,271
Totals for States in which polls were conducted by State Bar organizations	5,909	27,598	8,918	37,216

In the States in which mail-ballot referenda were conducted by voluntary State Bar Associations, the

ratio of the total vote polled by the State Associations on the proposal as to the Supreme Court was more than five to one in opposition. In the same States, the total vote in the American Bar Association polls was more than four to one in opposition.

In the total vote polled in the referenda conducted by State Bar organizations (integrated and voluntary) on the Supreme Court issue, the ratio was more than 4½ to one in opposition. In the same States, the total vote in the American Bar Association polls was more than four, but less than 4½ to one in opposition.

Looking at the over-all picture, it is clear that the American Bar Association polls elicited generally a larger and more representative expression from the lawyers than did the polls conducted by the State Bar organizations. In no State—North, South, East or West—did the referendum conducted by its State Bar organization show approval of the re-making of the Supreme Court or a vote which was even close upon that issue.

CONCLUSIONS VALUABLE FOR THE ASSOCIATION AND THE PROFESSION

Under the leadership of President Frederick H. Stinchfield this year, the Association has gone steadily ahead, in making its activities responsive to the views and needs of the rank and file of its members. The claim is not likely to be heard again soon that the attitude and action of the Association are out of line with the views of the lawyers generally. An unprecedented number of lawyers—about 52,000—who are not now members of the Association, have utilized its democratic machinery to express their views upon the pending proposals as to the Courts of the United States. The Association has placed the results of that vote, State by State, before all of the members of the Senate and the House of Representatives.

The experience gained through these referenda seems to warrant several observations, which may be of value to the Association and to the members of the profession of law:

1. At least several thousand ballot envelopes, addressed according to available lists of lawyers, did not reach the intended recipients and were returned by the postal authorities. This means that in the ranks of the profession in the United States there are at least several thousand members of the Bar who are not reached by first-class mail at or through their last known addresses. The exact number of such "returns" I do not yet know, but the number already is considerable and surprising. In addition, there were a still greater number of members of the Bar, many of them members of the Association, who received the ballots but did not avail themselves of the opportunity to register their views upon questions vitally affecting their profession and their country. In some instances, the failure to return the ballots was undoubtedly due to indifference or hostility as to the Association. In other instances, the ballot with its six formidable questions was laid aside, after the traditional habit of lawyers, for later and leisurely examination, and was lost or neglected until too late. In instances not few, it seems warranted to say that the refusal or failure to take part in this effort to ascertain the views of the profession was due to sheer indifference to the public obligations resting upon lawyers as officers of the Court and utter unresponsiveness to anything emanating from the organized Bar. Granted that voting by mail ballot was a new and unfamiliar method of deciding policies of the profession, the inability to have the ballot letter even delivered to several thousand lawyers, and the failure of a greater number to respond at all, reveal an existent situation.

2. The assurance of a secret ballot and count, under the auspices of an independent and highly competent Board of Elections headed by a distinguished jurist (Judge Edward T. Fairchild of the Supreme Court of Wisconsin) and unrelated to any controversies within the Association, is confirmed as an invaluable part of the Association's electoral machinery. Beyond a doubt, the balloting in at least several States, under the secret ballot, went differently from what would have taken place if the same lawyers had met and voted in open meeting. I have heard of lawyers, who did not vote in the referendum because they did not believe that the voting was really secret. It was; neither the Board of Elections nor anyone else knew how any person marked his ballot.

THE STATES AS UNITS OF ASSOCIATION VOTING

3. Examination of the tabulated results seems to me to show the importance of preserving and emphasizing the States as units, in all Association voting by mail. The desirability of this seems to be confirmed, both as to referenda upon questions of policy and as to the election of personnel. The autonomy of the State units and the consequent decentralization of control of the Association are the key-stones of the representative character of the Association and its House of Delegates. Anyone may take a pencil and paper, and contrast the ratios in which the votes were cast in fully half of the States on the Supreme Court proposal, with the over-all ratio, which was due largely to the ratios which prevailed in four or five States which cast a large number of votes. The Association will represent the profession in the whole country as it holds fast to the States as the units in all its electoral processes.

4. The referendum vote by mail is confirmed as an available and suitable procedure by which the major policies of the Association can be decided by the rank and file of its members, and by which the prevailing views of the profession can be ascertained when occasion arises. Major questions can be definitely formulated, and a vote taken for or against specific proposals. There was practically no criticism of the fairness of the referendum as conducted by the Association. The ref-

erendum to members was decided on in February, and the ballots were sent out during the last week of that month. The polls were closed on March 10th, and the results were tabulated and announced immediately thereafter. The March issue of the JOURNAL refrained from discussion of the Supreme Court issue, pending the poll of members. More than twenty days after the results of the voting by members had been announced, the April issue of the JOURNAL supported the policy of the Association as voted decisively by its members. At the same time, the JOURNAL desires to present both sides of the Court controversy, for information and in fairness to the minority of Association membership, as the May issue attests. Proponents and opponents alike regarded as essentially fair the submitted questions and the manner of their submission. There has been no acrimony or personal recrimination, no challenge of motives and no aspersions against individuals, in what has been done and said in behalf of the American Bar Association on these stirring issues. This is as it should be; the expressed views of American lawyers go to the merits of the matters voted on. At the same time, it should be recognized that the usefulness and practicability of referenda are limited to major questions on which there has been extensive public discussion and on which opinion has begun to take form. Voting by mail could not feasibly be used for deciding what the Association should do as to the multitude of questions which come up continually from its various Sections and Committees, and from State and local Bar Associations, as well as from the membership. As to all except questions of general public importance, the action of the Association is necessarily entrusted to the thoroughly representative House of Delegates, subject always to action by the members of the Association constituting the Assembly at an annual meeting, which may require that any question shall be submitted to the whole membership by referendum, if the Assembly after full discussion disagrees with the House of Delegates. It is therefore all-important that in each State the American Bar Association members shall elect thoroughly representative lawyers as State Delegates, and that the members of each State Bar Association and participating local Bar Association shall choose thoroughly representative Delegates from those Associations, in order that the House of Delegates shall be made up of men in whose responsiveness to the views of the profession the rank and file of lawyers have full confidence. The members of each State Association and participating local Association have the power to decide in what manner their Delegates shall be elected or selected; the vital thing is a thoroughly representative choice.

TEN THOUSAND NEW MEMBERS NEEDED BY THE ASSOCIATION

5. The developments since the pending proposals were submitted to the Congress on February 5, 1937, have disclosed inadequacies in the resources and organization of the Association, which need to be considered and remedied, if the Association is to be of aid to the public in such a long contest. Extensive and expert research was greatly needed, upon many phases of the proposals; the Association had no staff for such work, and had to depend upon impromptu assembling of volunteers—lawyers who could ill afford to leave their offices and their work for clients. The slender financial resources of the Association, from the dues of members, were already absorbed in the usual work of the Association and left little or no margin for the considerable amount of additional clerical work, correspondence, travelling expenses, etc., incident to the referenda and to the representation of the Association at and during the hearings in Washington. The Association greatly needs at least 10,000 new members, and needs them soon; and each member ought to do what he can immediately, to obtain desirable new members and add to the resources of the Association for its broadened activities.

AFTER THE REFERENDUM—WHAT?

6. That the results of the Association polls of its members and non-members have carried weight with members of the Senate and House, there can be no doubt. This is true both as to the measures approved and those disapproved. The practical difficulty may prove soon to be that such voting by mail has been and is of necessity related to the approval or disapproval of specific measures in the Congress, and cannot be predicated upon the expression of opinion upon abstractions or generalities. Already the point has been made, at the hearings and on the floor of the House, that the Association has acted upon the specific proposals submitted in The Message of February 5, 1937, and that its members have expressed no views upon various suggested alternatives or substitutes, which are being or may be seriously considered. Representatives of the Association have been urged to support, or at least to express the views of the Association or their personal views as to some of the suggested alternatives; but the fact is that Association members have taken no action upon any of them, aside from the practically unanimous votes taken, upon several of them, in the Assembly at Boston last August.

It has even been suggested, in Washington, that members of the Association are to be classed as "defeatist lawyers" because they have disapproved two out of six proposals made by The Message of February 5, 1937, and that in order to avoid this characterization they ought in good faith to bring forward and support some acceptable method of accomplishing the same *results,* in the re-making of the Supreme Court and the other Courts of the United States. Such an assertion assumes, of course, that there could be devised an acceptable *method* of accomplishing like results. Granted that there may be choice between abuses of power, and that there may be differences of degree and

(*Continued on page* 381)

DEFENSE OF OUR CONSTITUTIONAL SYSTEM

If Precedent Is Set by Adoption of Proposal with Respect to Supreme Court, There Is No Limit to the Subsequent Use of Power to Pack the Court, and to Abandon not only One, but All of the Present Principles on Which Our Government Rests—Transfer of Authority to Determine the Scope of Their Power to the Political Branches of the National Government, or to a Court Subservient to One of These Branches, Means Abandonment of Any Method of Keeping that Government within the Scope of Its Granted Powers—The Court Has Become, and Was Intended to Become, the Agency of the National Government for the Construction of the Constitution—Has not Been a Bar to Progress—Difficulties in Social and Industrial Legislation Largely Due to Hasty and Defective Legislative Action, etc.

By Walter F. Dodd
Member of the Chicago, Illinois, Bar

THE present struggle in Washington is not one for the protection of the Supreme Court, but is rather a struggle for the protection of our constitutional system. The proposal recently made by the President of the United States is the first publicly avowed effort to increase substantially the membership of the court for the purpose of obtaining a different view by the court as to constitutional issues coming before it. It is true that political considerations have on several occasions influenced increases or decreases in the membership of the Court, but never before has this device been suggested as a means of controlling the decisions of that Court. Two new judges, appointed in 1870, brought about a reversal of view by the Supreme Court in the Legal Tender Cases, and the packing of the Court by President Grant was charged, but the vacancies were not created for this purpose, and the occasion for reversal existed only because the then Chief Justice insisted that an opinion be rendered by four of seven judges, when there were two vacancies existing at the time. The mere allegation, without basis of fact, that the Court was packed at that time materially diminished the public respect for the highest body in our judicial system. Clear evidence of such packing would, and should, not only diminish popular respect, but destroy such respect.

The plan now proposed, if once successfully used by an executive to accomplish his purpose, will continue to be employed, and if it is permitted to be used, the highest court of this country will be and should be discredited. And if the courts may be controlled in this manner as to public issues, they must cease to be trusted as impartial arbiters of private rights. The purchase of judicial decisions, either by favors or in cash, long ago ceased to be an abuse in the public affairs of English-speaking people, and it is unfortunate that any one should sponsor a return to a condition that was abandoned with the establishment of free government.

The proposed plan is sought to be justified on the ground that Congress has power to determine the number of members of the Supreme Court. The existence of power in one department of government with respect to another does not warrant the exercise of such power to destroy or to defeat the authority of such other departments. Otherwise Congress could destroy the other two departments by failure to appropriate moneys for their expenses; or the President could cripple the other two departments by vetoing appropriations for their expenses. And though it might be a usurpation of authority, the President, as commander in chief of the army and navy, might take steps materially interfering with the other two departments. The operation of a republican system of government requires a comity among the three departments, and the fact that power technically conferred upon the one may be employed to destroy the other gives no basis, either morally or otherwise, for such excessive use of power. The existence of a power does not justify its abuse.

Under our system of government, the Supreme Court has become, and was intended to become, the agency of the national government for the construction of the constitution. It has been alleged in the past, and is now again being alleged, that the power so exercised was usurped by the Court, through Marshall's opinion in *Marbury v. Madison,* 1 Cranch, 137 (1803). Every person who has studied the subject knows that the judicial power ante-dates *Marbury v. Madison,* and that the judicial construction of the constitution was in the minds of those who framed and adopted that document, and of those who enacted the Judiciary Act of 1789 and proposed the first ten amendments to the constitution. From the standpoint of evidence as to the views of members of the constitutional convention, the little book of Charles A. Beard on "The Supreme Court and the Constitution" (1912) is conclusive.

The fundamental principles of the constitution, thus subject to construction by the Court, are three in number: (1) the establishment of a federal system, with certain powers granted to the national government, and with the other powers "reserved to the states respec-

tively or to the people"; (2) the organization of a government into three departments, each vested with certain powers, and, (3) guaranties against federal or state impairment of individual rights.

These principles are well illustrated by three unanimous opinions handed down by the court on May 27, 1935, and these opinions were the subject of caustic comment by the President at the time of their publication. In the *Schechter* case (295 U. S. 495) the court held that the power conferred upon Congress to regulate commerce "among the several states" did not include power to regulate domestic labor engaged in the local sale of poultry; in the *Rathbun* case (295 U. S. 602) the court held that Congress had power to fix the term of a federal trade commissioner and to prevent his removal by the President because his opinions, based on evidence, were not in agreement with what the President desired; in the *Radford* case (295 U. S. 555) the court held that there was deprivation of property without due process of law, in violation of the Fifth Amendment, under an act of Congress which would have forced the acceptance of $4,445 in full settlement of a mortgage obligation of $9,205.09.

Through the proposed packing of the Court, changes are perhaps now primarily sought in judicial opinion as to the scope of national power, and particularly as to the scope of the national commerce power, although it is difficult to conceive of a broader definition of the commerce power than that recently announced in the construction of the National Labor Relations Act of 1935 (the Wagner Act). But if a precedent of this character is once established, there is no limit to the subsequent use of the power to pack the Court, and to abandon not only one, but all of the present principles upon which our government rests.

It may be that we have outgrown the federal system of government, with a distribution of powers between state and nation. I think not, although I think that no function national in character will or should remain permanently under the control of state and local authority. Under the federal system there must be an arbiter to determine controversies between two governing bodies exercising political authority over the same territory. This arbiter, until the present, has been the United States Supreme Court, an organ of the national government, but an organ less political in character than the Congress and the Executive.

If we transfer the authority to determine the scope of their power to the political branches of the national government, or to a court subservient to one of these political branches, we shall, in effect, abandon any method of keeping the national government within the scope of its granted powers. We will have authorized the national government to do all that is now sought by the Child Labor Amendment and, in addition, to exercise every other governmental power that it sees fit to exercise. Perhaps this may be the wise thing to do, but, if it is to be done, let us do it honestly. Because of the feeling of possible danger in the unrestrained exercise of national power, and not because of advocacy of child labor, state legislatures in New York and other states, which received their mandate at the same time as the President, have refused to ratify the Child Labor Amendment. No mandate has been given by the people to the present Chief Executive to accomplish purposes much wider in scope than those sought to be accomplished by a pending and unratified constitutional amendment.

It may be that we have outlived the principle of three departments of government, with the safeguard of judicial determination of individual rights. Yet the determination of such rights by an independent judiciary was basic in the struggles for liberty both in England and in America, and I, for one, doubt whether we wish to surrender such protection.

It may be that the President, the Congress of the United States and our state legislatures can be relied upon to determine what individual rights are to be protected against national and state impairment, yet I, for one, am unwilling to surrender to these political departments or to a subservient court, the protection of freedom of teaching, of speech and of the press, so ably maintained by the Supreme Court in *Pierce v. Society of Sisters*, 268 U. S. 510 (1925); *Near v. Minnesota*, 283 U. S. 697 (1931); *Stromberg v. California*, 283 U. S. 359 (1931); and *DeJonge v. Oregon*, 57 Sup. Ct., 255 (January 4, 1937); nor would I desire to weaken the judicial protection of the accused in criminal cases, found in such decisions as *Moore v. Dempsey*, 261 U. S. 86 (1923); *Powell v. Alabama*, 287 U. S. 45 (1932); and *Brown v. Mississippi*, 297 U. S. 278 (1936). The judicial enforcement of these guaranties is necessary for the protection of minorities, and the majority of today may be the minority of tomorrow.

Let us remember that when we submit to a subservient court, we have surrendered not merely one of these principles but all of them, and that when we have surrendered them to the present Chief Executive we have surrendered them to his successors as well. Whatever may be our confidence in the uses that may be made by the present Executive of powers that can be vested only in a dictator, we must consider the future as well as the present. We are told that political liberties are adequately protected in England without the safeguard of judicial construction of a written constitution, and this is true, but England has safeguards which we do not possess, and which it is not proposed that we adopt in substitution for those that we do possess. We are asked to abandon safeguards which have protected us for one hundred and fifty years, and to accept as a substitute only such confidence as we may have in our present national executive and his successors.

It has been urged that it is unfair to suspect the President of an intention to control the views of judges whom he may appoint, but suspicion need not be resorted to when he has made his purpose clear; and

what he now proposes is what he attempted to do in the removal of Judge Humphrey from the Federal Trade Commission.

In urging the preservation of our constitutional system, we do not contend for a policy of inaction, either by state or national governments. The constitution confers national powers in broad terms, and the Court has construed such powers broadly. Without such construction we would not today have the broad national control of banking; the extension of admiralty jurisdiction to all navigable waters; the control of intrastate railroad rates and of other transactions affecting interstate commerce; the expansion of the bankruptcy power; the broad federal powers of monetary control. This development did not stop with Marshall. Chief Justice Taney did much to develop such power, and its expansion will be found represented by opinions of Hughes, Van Devanter and other present members of the court. Broad and flexible language, either in a constitution or a statute, necessarily leaves a wide discretion in the Court, and such discretion is necessary to a federal system in a changing world. But language, no matter how broadly construed, has its limitation, and the national government is, after all, a government of delegated power. It has certain granted powers, and the fact that its powers were intended to be limited is emphasized by the Tenth Amendment.

In spite of a recent statement to the contrary by the President of the United States, the constitution does not grant to Congress a broad and undefined power to provide for the "general welfare" of the United States, but it does authorize the use of federal taxes in order to provide for such welfare. The President's recent address quoted the taxing power clause of the constitution with omissions, and, as so quoted, the clause appeared to indicate that independent powers were conferred upon Congress by the phrase with respect to the "general welfare." Gouverneur Morris, the penman of the constitution, may have sought to accomplish this result by a change in the punctuation of the taxing clause as it came from the Committee on Style to the Constitutional Convention of 1787, but if he made this effort he was unsuccessful. If he made such an effort, it but shows that political tricks were known to at least one of our "founding fathers."

It is claimed that the power vested in Congress to regulate "commerce among the several states" has not been construed broadly enough, and on the other hand, that the limitations imposed by the "due process" clauses of the Fifth and Fourteenth Amendments have been construed too broadly, although broad construction appears to have been intended by the framers of the Fourteenth Amendment. Due process as applicable to procedure has not been the object of criticism; and its extension in the field of individual rights has been the subject of praise rather than of blame, although such extension involved the widest use of judicial discretion.

The commerce clause even in its broadest application cannot be construed to apply to the "host of local enterprises throughout the country" which have but an indirect and remote relation to interstate commerce; and in giving a broad construction to the commerce power in *National Labor Relations Board v. Jones & Laughlin Steel Corporation*, decided April 12, 1937, Chief Justice Hughes found it necessary to say:

> "Undoubtedly the scope of this power must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government."

The same view is reflected by Chief Justice Marshall, the stalwart champion of federal power, who said in 1819 that "no political dreamer was ever wild enough to think of breaking down the line which separates the states, and of compounding the American people in one common mass." But the powers of Congress, as judicially construed, have been broad enough to meet the growing needs of the country. As said by Mr. Chief Justice Waite in *Pensacola Telegraph Co. v. Western Union Telegraph Co.*, 96 U. S. 1 (1878):

> "The powers thus granted are not confined to the instrumentalities of commerce, or the postal service known or in use when the Constitution was adopted, but they keep pace with the progress of the country, and adapt themselves to the new developments of time and circumstances. They extend from the horse with its rider to the stagecoach, from the sailing vessel to the steamboat, from the coach and the steamboat to the railroad, and from the railroad to the telegraph, as these new agencies are successively brought into use to meet the demands of increasing population and wealth. They were intended for the government of the business to which they relate, at all times and under all circumstances."

The constitution has not remained in the "horse and buggy" age. The Court, in construing it, has not been the recalcitrant member of a three-horse team. And an attentive view of the horizon indicates no twilight zone in which proper governmental action is impossible. Neither the constitution nor its judicial construction has been the bar to progress. Our difficulties in social and industrial legislation are largely due to hasty and defective legislation, and to a desire to standardize many activities on a national scale when a more diligent use of state government would accomplish greater progress. The Court was not responsible for the failure of the National Industrial Recovery Act, though it could do no other than hold the Act invalid by a unanimous decision. The court was not responsible for the absurdities of the first Frazier-Lemke Act, though it, of necessity, held the Act invalid, in an opinion by Mr. Justice Brandeis, approved by all members of the Court. No more was the Court responsible for the drafting of a proper Frazier-Lemke Act which was recently held valid by a unanimous Court again speaking through Mr. Justice Brandeis. The Court cannot make the laws.

But even the most flexible constitution will at times

(*Continued on page* 363)

BILL FOR "REFORMING" THE SUPREME COURT

Issues Raised by the Measure—What Woodrow Wilson Said and Thought of Exercise of Congressional Power to Manipulate the Courts—Early Instances of Legislative and Judicial Action Well within Constitutional Power but Arousing General Indignation — Supreme Court Proposal Conforms to Letter but Violates Spirit of the Constitution—Jefferson's Moderation—Keep Federal Judicial System out of Political Vortex—The President's Constitutional Theory—"The Judicial Veto"—"Psychic Coercion"—Increasing Number of Judges as a Means of Punishment—Suggested Alternatives

By Frank H. Sommer
Dean of Law School of New York University

IT will be my effort in these comments to be mindful of the admonition of Senator Robinson that "while earnestness is the path of immortality, vindictiveness and denunciation are indications of weakness in argument." I will endeavor to travel the "path of immortality" and will be watchful to avoid giving indications of weakness in argument through vindictiveness or denunciation.

Since, with Emerson, I believe that "you cannot unlock the door of truth with the rusty key of prejudice," I will attempt to lay prejudice aside as far as is possible for mere man.

Candor compels me to say that my life work has been primarily concerned with consideration of the powers of the States, and with furthering exertion by the States of powers relating to social and economic problems; with adapting the governments and laws of the States to the needs of changing social and economic conditions; with the States as laboratories of social and economic experimentation. The narrow field of my life work may color my views.

Finally, in these preliminary remarks, I unreservedly grant that the President, who frankly assumes responsibility for the plan embodied in the bill on which I comment, and that those who press for its enactment, believe as sincerely in, and are as devoted to, the ideals of free government, as are we who oppose its enactment. The differences between us are in concepts of ideals of free government and the bearing of the bill on these ideals.

The Issues raised by the bill, as I see them, are:

Does the bill square with the letter of the Constitution?

If it does, does it do violence to the spirit of the Constitution?

If it squares with the letter but violates the spirit of the Constitution, can it be successfully attacked in the Court?

If not, should it be enacted? Are there considerations of policy which should stay the enacting power of Congress?

This involves question whether the bill strikes at, or potentially threatens, the independence of the Court—whether it is likely to create widespread suspicion of, and violently shake public confidence in, the disinterestedness and impartiality of the judgments of the Court.

These questions, and these alone, will have my consideration. To build a sound foundation for answer to them requires that we look not solely to the present and the future, but that we also look back to the experience of the past. As Maitland said: "We must today study the day before yesterday in order that yesterday may not paralyze today and today may not paralyze tomorrow."

THE BILL CONFORMS TO THE LETTER OF THE CONSTITUTION

The Constitution, for reasons of practical necessity left with Congress power to determine from time to time the number of judges who should constitute the Supreme Court. The Constitution delimited the extent of the judicial jurisdiction of the Federal government. It divided the jurisdiction into "original" and "appellate." It vested original jurisdiction in the Supreme Court in all cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State is a party. With respect to all other cases to which the judicial jurisdiction extends it provided that the Supreme Court should have appellate jurisdiction, both as to Law and Fact, *"with such exceptions and under such regulations as the Congress shall make."* Until Congress set up, as it was empowered to do, a system of inferior federal courts, and prescribed their jurisdiction and until Congress exercised its power to regulate and make exceptions to the appellate jurisdiction of the Supreme Court, no one could forecast the extent of the work of that court; no one could foretell the number of judges required to the prompt and effective performance of that work.

No one could foresee what changes might be effected from time to time in the future in the exercise by Congress of its power to establish and to delimit the

jurisdiction of inferior federal courts and the power to regulate and make exceptions to the appellate jurisdiction of the Supreme Court.

The Constitution therefore left the way open to Congress to adapt the number of judges of the Court to the necessities of the business before the court as these necessities developed. This power was left with the Congress for this purpose and to this end alone. To employ it for any other purpose or to any other end may with reason be contended to be an abuse of the power granted.

That this was the view of Woodrow Wilson, in admiration for whose greatness of mind and heart and clear vision of the American plan of government I give way to no one, is evidenced by these, his words:

"The Constitution provides, indeed, that all judges of the United States shall hold their offices during good behavior, but Congress could readily overcome a hostile majority in any court or in any set of courts, even the Supreme Court itself, by a sufficient increase in the number of judges and an adroit manipulation of jurisdiction and could with the assistance of the President make them up to suit its own purposes. The two "coordinate" branches of the government, to which the court speaks in such authoritative fashion with regard to the powers they may and may not exercise under the Constitution—namely, Congress and the Executive—may in fact, if they choose, manipulate the courts to their own ends without formal violation of any provision of the fundamental law of the land. *There has never been any serious fear that they would do anything of the kind,* though an occasional appointment to the Supreme Court has made the country uneasy and suspicious. But it is well to keep the matter clearly before us."

Woodrow Wilson here wrote of the past. He could not foresee this day.

SINCE BILL IS TECHNICALLY WITHIN THE CONSTITUTION IT CANNOT BE SUCCESSFULLY CHALLENGED IN THE COURT

Though the exercise by Congress of this power for a purpose or end other than that for which the power was left with Congress would constitute an abuse of power, it could not be successfully challenged in the Supreme Court. This result flows from a self restraining principle which that Court has declared, namely, that where constitutional power for a Congressional enactment is found to exist, the Court will not venture on inquiry as to the motives leading to the exercise of the power.

A sound view of the constitutional provision now considered would interpret it as nothing more nor less than a command to Congress to organize the Supreme Court in such force as to provide for the transaction of the business before it. But upon this subject Congress is, under the decisions of the Court, the sole interpreter of the Constitution.

The exercise by Congress of this power for a purpose or to an end other than that for which the power was bestowed, while conforming to the letter, would violate the spirit of the Constitution.

CONSTITUTIONAL POWER IS ONE THING—WHETHER IT SHALL BE ASSERTED IS ANOTHER

Constitutional power is one thing. The policy of its assertion in specific instances is quite another.

Action, legislative and judicial, well within constitutional power, that nevertheless aroused general indignation and effective disapproval comes readily to mind.

EARLY SECRET SESSIONS OF SENATE

The Senate, making no distinction between legislative and executive sessions, shrouded itself in secrecy and from 1789 until 1793 held its sessions behind closed doors, barring the public. In 1790, in 1791, and again in 1792, the Senate voted down a proposal to open its legislative sessions to the people. In 1793 it defeated a resolution which in substance declared "that publishing the proceedings of the Senate in the newspapers is the best means of diffusing information concerning the motives and conduct of its members, and that without such information given to the people, the sense of responsibility on the part of the Senators to their constituents is in great measure annihilated, and the best security against the abuse of power is abandoned." It was not until February 1793, after sitting behind closed doors for four years that the Senate voted to open them during legislative sessions with the beginning of the following session. The procedure of the Senate was within its constitutional power, but would anyone now question that it repudiated the principles of official responsibility and of publicity; principles that the Constitution bulwarked by establishing freedom of the press? Aroused public opinion alone compelled the Senate to conform to the spirit of the Constitution.

CHIEF JUSTICES FILLING JUDICIAL AND POLITICAL OFFICES

Again, in the early days under the Constitution, the Chief Justices of the Supreme Court at times concurrently filled political office; exercised at the same time judicial and political functions. John Jay while holding the office of Chief Justice spent a year abroad as Envoy Extraordinary to Great Britain. John Marshall was both Chief Justice and Secretary of State for five weeks during which he held one term of the Supreme Court. Oliver Ellsworth was both Chief Justice and minister to France at one time for more than a year during which he held one term of court. Though these incidents involved no violation of the letter of the Constitution they evoked wide adverse comment. Though no constitutional prohibition expressly precludes the so investing the Chief Justice with purely political functions, yet would it not now be deemed con-

trary to the spirit of the Constitution or the proprieties of judicial office?

Constitutional power may exist. There always remains the question of the policy of exerting it. Congress possesses power under the Constitution to completely disestablish the inferior federal courts and to completely withdraw the right to appeal from the judgments of the courts of last resort of the several States to the Supreme Court. Yet would anyone advocate exercise of this power as a means of withdrawing acts of the Congress and of the legislatures of the several States from the power of the Supreme Court to deny them effect on the ground of their unconstitutionality? Congress possesses constitutional power to fail to appropriate moneys for the salaries of the Judges of the Court. Would anyone approve the exercise of this power in an effort to bring the Court to knee and to the conforming of its judgments to the will of Congress?

The Constitution vests the treaty-making power in the President with the advice and consent of two thirds of the Senators present. The power is not defined. It extends to "every proper subject of international arrangement." Labor conditions and relations are now recognized to be matters of international concern. We have taken account of this international concern by participating in the International Labor Office which the League of Nations established. Labor conditions and relations being matters of international concern might, with reason, be contended to be proper subjects of international arrangement and so within the treaty-making power. Is it not, however, unthinkable that through such power any President and Senate would limit the power of the several States to deal with labor conditions and relations, and fasten upon the several States a policy treaty-created?

One of the perils inhering in the pending bill is this: When once the door is opened to attaining by technically constitutional indirection, ends for which the Constitution has provided a direct way of accomplishment, no one can tell how soon the body will follow the nose of the usurping camel into the tent of constitutional order. This is the sort of reform—reform by circuitous indirection—that grows by what it feeds upon.

THE BILL DOES VIOLENCE TO THE SPIRIT OF THE CONSTITUTION

Does the bill merely adapt the number of judges constituting the court to the number needed for the prompt and effective performance of the work of the court and so square in letter and in spirit with the Constitution? In other words, is its purpose and is its end that for which the power to prescribe the number of judges was left with Congress?

Uncontradicted testimony requires the answer—No!

According to the report for the last fiscal year made by the Solicitor-General (independently appointed by the President) "the work of the Court is current and cases are heard as soon after records have been printed as briefs can be prepared. Prompt hearing and decisions were had in all cases of large public interest." To the testimony of the Solicitor-General is now added that of the Chief Justice, who speaks for himself and his associates, saying that the court is well up in its work. The testimony of the Chief Justice is now reinforced by the testimony of the Clerk of the Court.

The answer made is justified. It follows that though the bill is formally constitutional it does violence to the end and the purpose for which the power thereby exercised was left with Congress.

If the parts of the bill relating exclusively to the inferior federal courts are enacted and result in speeding cases to the Supreme Court to such extent as to outrun the capacity of the Court as now constituted, to continue to dispatch the business of the Court promptly, adequately, and effectively, a situation will then exist, that does not now exist, that will lay a basis on which Congress may determine, consistently with the letter *and* spirit of the Constitution, whether the situation may best be met by further contracting the appellate jurisdiction of the Court or by increasing the number of its members.

The procedure of the Court in exercising its discretionary appellate jurisdiction as explained by the Chief Justice cannot justly be criticized. On the basis of my own experience the explanation made accords with the facts.

The procedure is that generally prevailing on applications for writs of *certiorari*. The procedure follows and gives full effect to the will of Congress which body, with complete control over the appellate jurisdiction of the Court, lodged discretionary jurisdiction in the Court. So far as I know, no bill is pending to convert reviews now resting in the Court's discretion into reviews of right. If and when in the future, Congress effects such change, and if and when in consequence, the burden of the Court is increased beyond its capacity as now constituted, then a basis for Congressional action will exist that will meet the requirements of both the letter *and* spirit of the Constitution for increasing the membership of the Court. But not until then will there be such basis. The then conditions will furnish a yardstick by means of which the need for augmenting the membership of the Court may be measured.

What need for Congress to play the part of seer and now design judicial machinery to meet conditions that may never arise, and the demands of which conditions when, if ever, they arise cannot now be known?

Uncontradicted testimony is further to the effect that increasing the number of the justices in the Court will not further prompt, adequate, and effective disposition of the work of the Court but will on the contrary retard disposition.

The Chief Justice voicing his own judgment and that of his associates asserts that: "An increase in the number of the justices of the Supreme Court, . . .

would not promote the efficiency of the court. It is believed that it would impair that efficiency. . . . There would be more judges to hear, more judges to confer, more judges to discuss, more judges to be convinced and to decide. The present number of justices is thought to be large enough so far as the prompt, adequate and efficient conduct of the work of the Court is concerned."

If the judgment of the Court so voiced is subject to the charge of being self-serving, the testimony of Felix Frankfurter and James M. Landis may be adduced. They recognize that "there are intrinsic limits to the size of a court" and apparently favor contracting appellate jurisdiction over increasing the membership of the Court. They have written: "Perhaps the decisive factor in the history of the Supreme Court is its progressive contraction of jurisdiction. This tendency has been particularly significant since the Civil War. In contrast with the vast expansion of the bounds of the inferior federal courts, the scope of review by the Supreme court has been steadily narrowed. *Familiar devices for dealing with the growth in business by adding to personnel have been eschewed.* The serious proposals made from time to time to increase the membership of the Court, to add temporary judges, to break up an enlarged Court into divisions, did not prevail. *There are intrinsic limits to the size of a court if it is to be a coherent instrument for the dispatch of business and at the same time to observe the needs of consultation and deliberation.* The effective conditions for insuring the quality of judicial output of the Supreme Court have been maintained. Human limitations have been respected. . . . Despite the country's phenomenal increase in population and wealth and the resulting extension of governmental activities, the duties of the Supreme Court have been kept within limits of nine judges who are not supermen."

Could witnesses more disinterested and of wider study than the authors of the *Business of the Supreme Court* be called?

It follows that the bill conforms to the letter of the Constitution. However, since the purpose of the bill is not, in fact, to adjust the number of the judges to the work of the Court, but is a wholly different purpose, not within the Constitution the bill violates the spirit of the Constitution.

The objection here made runs with equal force against a proposed modification of the bill by restricting the number of added appointments that may be made in any one year.

EARLIER ACTS CITED AS PRECEDENTS—SHAMEFUL

Prior acts of Congress are called up as precedents justifying enacting the pending bill—precedents of increases and decreases in the membership of the court. Some of these precedents should serve as cautionary signals.

THE "MIDNIGHT JUDGES" OF 1801

Even after the passing of one hundred and thirty-five years one of them must bring a blush of shame to the cheeks of the most brazen partisan of this day. Edward S. Corwin depicts the scene vividly. I use his account freely. Jefferson had been elected President. The Federalists about to lose control of Executive and of Congress proceeded to take steps to convert the Judiciary into a partisan stronghold. By act of February 13, 1801, the number of associate justiceships was reduced to four, in the hope that the new Administration might in this way be excluded from opportunity to make any appointments to the Supreme Bench; the number of district judgeships was enlarged by five; and six Circuit Courts were created. Thus places for sixteen new judges were provided. When John Adams, the retiring President, proceeded with the aid of the Federalist majority in the Senate, to fill the new posts with the so-called "midnight judges" the rage and consternation of the Republican leaders broke all bounds. Jefferson entered office determined that the act of February 13, 1801, should be repealed and that the judges holding by appointment thereunder, though entitled to hold their offices "during good behavior" under the Constitution, should be ousted. The repealing and ousting Act was voted by a strict party majority and was reenforced by a provision postponing the next session of the Supreme Court until the following February. The hope was that by that time all disposition to test the validity of the Repealing Act in the Court would have passed.

JEFFERSON'S MODERATION

I give Corwin's judgment upon the action of both Federalists and Republicans: "When it came to legislation concerning the Supreme Court the majority of the Republicans again displayed genuine moderation, for *thrusting aside an obvious temptation to swamp that tribunal with additional judges of their own creed, they merely restored it to its original size under the Act of* 1789.

"Nevertheless the most significant aspect in the repeal of the Act of February 13, 1801, was the fact itself. The Republicans had now shown a more flagrant partisanism in effecting this repeal than had the Federalists in enacting the measure which was now at an end. Though the Federalists had sinned first, the fact nevertheless remained that in realizing their purpose the Republican majority had established a precedent which threatened to make of the lower Federal Judiciary the merest cat's-paw of party convenience. The attitude of the Republican leaders was even more menacing for it touched the security of the Supreme Court itself in the enjoyment of its highest prerogative and so imperilled the unity of the nation."

FEDERAL JUDICIAL SYSTEM MUST NOT AGAIN BE DRAWN INTO POLITICAL VORTEX

Surely we cannot—we dare not—lightly pave the way to a return to the conditions of those days when the federal judicial system was so drawn into the vortex

of partisan politics—when the federal courts were regarded by a large proportion of the people to be a political adjunct of a political party. Yet that is what the bill may do.

The party now dominant, though the cross be heavy, would be wise to follow in the footsteps of the equally sorely tried Jefferson, give heed to counsels of moderation respecting action relating to the Supreme Court; put aside the temptation to swamp the court with additional judges of their own choosing and avoid imperilling, and, by moderation further the unity of the nation as it girds itself to squarely face and grapple with admittedly grave social and economic problems.

HATEFUL VENGEANCE THE BASIS OF THE ACT OF 1866

Folly only would dictate resting justification of the pending bill on the act of 1866 which provided for reducing the membership of the Supreme Court to seven. That act was born of the unbridled hatreds aroused by the war between the States. It was rooted in vengeful bitterness against rational reconstruction. It was wrathful fear that the conciliatory policies of Andrew Johnson might be furthered by his appointees that led Congress to provide that no vacancy on the Court should be filled "until the number of associate judges should be reduced to six."

Claude G. Bowers writing of the Tragic Era which produced this precedent said that the era was one in which the "Constitution was treated as a door-mat on which politicians and army officers wiped their feet after wading in the muck."

LEGAL TENDER ACT—APPOINTMENTS 1868

The controversy growing out of the added appointments to the Supreme Court in 1868 by means of which, whether so designed or not, reversal of the first decision on the Legal Tender Act was brought about on rehearing, still reverberates.

Precedents are of bad and good repute. The repute of these is evil.

Now during sixty-eight years the constitutent membership of the Supreme Court has stood unaltered. For sixty-eight years these precedents with the ill-consequences of the hatreds and suspicions which followed in their train have successfully flashed the warning: "Stop, look and listen." They still flash that warning. I am one of many who hope that the signals of danger which the past so sets may be heeded in the present.

The influence of legislative precedents persists though they be evil.

Are we to mount upon precedents of ill repute, another?

THE COMMERCE COURT REPEAL—1913

How short the memories of men; how powerful the influence of a precedent though of evil repute and though ill consequences follow in its train, appears in connection with the disestablishment of the Commerce Court when in 1913 one political party succeeded another in power. The House voted to abolish the Court. It also voted to abolish the judgeships. The vote on the latter proposal stood 80 to 40. The Senate voted to abolish the Court. It, however, by a narrow majority —25 to 23—voted to retain the judges of the Court as circuit judges. Then came conference. The House conferees refused to concur in retaining the judges. Finally the view of the Senate prevailed in the House. Repetition of the blow struck at the constitutional tenure of federal judges in 1801 was only averted by the narrowest of margins.

Though the court will not, if the bill is enacted, inquire into the motives leading to its enactment, we may and should make such inquiry when the question before us is—Shall the bill be enacted?

Now turn to the fundamental objections to the bill. The charge is made, not without a measure of justification, that the court has in certain cases departed from sound principles and distorted the Constitution by tortured construction. It is asserted that the purpose of the bill is to assure a return to sound principles and to correct the distortions such tortured construction has produced.

THE PRESIDENT'S CONSTITUTIONAL THEORY

The President's constitutional theory as to the powers of Congress, however, would if an augmented Court gave it effect, not only result in departure from sound principles in exceptional cases, but would make the departure universal. The theory if so given effect would correct distorted construction of particular provisions in a limited number of cases by means of radical and sweeping distortion of the Constitution as a whole.

The President expressed his theory in the "Fireside Chat." He said: "In its preamble the Constitution states that it was intended to form a more perfect union and promote the general welfare; and the powers given to the Congress to carry out those purposes can best be described by saying that they were all the powers needed to meet each and every problem which then had a national character and which could not be met by merely local action.

"But the framers went further. Having in mind that in succeeding generations many other problems then undreamed of would become national problems, they gave to the Congress the ample broad powers 'to levy taxes . . . and provide for the common defense and general welfare of the United States.'

"That, my friends, is what I honestly believe to have been the clear and underlying purpose of the patriots who wrote the Federal Constitution."

Had the quoted provision of the Constitution been set out more fully the fundamental error would have been evident. The provisions reads: "The Congress shall have power to lay and collect Taxes, Duties, Imposts and excises *to* pay the debts and Provide for the common defence and general welfare of the United

States; but all Duties, Imposts and Excises shall be uniform throughout the United States."

This theory, now presented dressed in carefully meditated words, was foreshadowed by an extemporaneous statement made in the "horse and buggy" interview. In that interview the President said: "If we accept the point of view that under the Constitution we cannot deal with matters left wholly to the States we go back automatically to the Government of 1789."

EFFECT OF PRESIDENT'S THEORY

Reading the opinions, both prevailing and dissenting in the A. A. A. case, and bringing into view the historic background of this provision, leaves the President's theory as to the "purpose of the patriots who wrote the Federal Constitution" in framing the quoted provision, without support. The purpose, in fact, was merely to grant to Congress the power to lay and collect taxes—a power necessarily involving the power to spend—and to provide through such power of spending for the general welfare of the United States. The provision does not confer on Congress power to legislate as to all matters which in its judgment concern the general welfare. It merely grants Congress power to use public money for any purpose that concerns the public welfare with incidental legislative power to make the spending effective. The President's theory would, in effect, exscind the Tenth Amendment from the Constitution. That Amendment provides: "The powers not delegated to the United States, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

The question whether power as broad and unlimited as that which would flow from the President's theory should be vested in Congress is not the question that now concerns me.

What does concern me is that the Constitution as it now stands neither vests such power, nor lays a basis for even tenuously reasonable claim that it was intended to be conferred, and that it is now purposed to pave the way to exercise of such power without taking the judgment of the people as to whether it should be vested.

That there are extensions of the meaning of constitutional provisions by interpretation I admit. Such extensions resulting from interpretation in the spirit of the Constitution do no violence to the Constitution. Extensions so resulting make the Constitution what it was designed to be—"a living instrument."

The extension, which the President's theory involves, would not be the production of interpretation in the spirit of the Constitution. It would flow from interpretation the product of sheer will; determination that what the interpreter would have it mean the Constitution shall mean, and that alone. Such interpretation whether by Court, Executive or Congress strikes at the constitutional structure as a whole.

THE INDEPENDENCE OF THE JUDICIARY ESTABLISHED

That it was the purpose through the Constitution to place the Federal Judiciary in a position of independence surely needs no demonstration. To that end they were given tenure "during good behavior"; and it was provided that they should at stated times receive for their services, a compensation, which should not be diminished "during their continuance in office." While they were left subject to removal through impeachment, the convention framing the constitution decisively rejected a proposal that they be subject to removal through "joint address to the two Houses." How deep-rooted the conviction was that it is vital that the Judiciary be independent and, in exercising the judicial power, free from influence by President and Congress, appears from an incident in the convention that, in this day, raises a smile. When the résolution relating to the salaries of the judges was first before the convention it provided that "*no increase* or diminution" should be made. It was moved to strike out the words "no increase."

Madison opposed saying: "The dependence will be less if the *increase alone* should be permitted; but it would be improper *even so far* to permit a dependence. Whenever an increase is wished by the Judges, or may be in agitation by the Legislature, an undue complaisance in the former may be felt by the latter. If at such a crisis there should be in court suits to which leading members of the Legislature may be parties, the Judges will be in a situation which ought not to be suffered, if it can be prevented. The variations in the value of money may be guarded against by taking for a standard wheat or some other thing of permanent value. The increase of business will be provided for by an increase in the number of judges who are to do it. An increase of salaries may be easily so contrived as not to affect persons in office."

Gouveneur Morris, making the motion to strike out, said: "The Legislative ought to be at liberty to increase salaries, as circumstances might require; and that this would not create any improper dependence in the Judges."

The motion carried but not without dissent. Virginia and North Carolina voted, no; Georgia was absent.

PRESIDENT'S RECOGNITION OF PURPOSE TO ESTABLISH AN INDEPENDENT JUDICIARY

The President recognizes the constitutional purpose to establish an independent judiciary, saying: "I want —as all Americans want—an independent judiciary as proposed by the framers of the Constitution." He submits that the bill carries no threat to independency. There issue is joined.

Woodrow Wilson recognized the purpose to establish, and the imperative necessity under our constitu-

tional system for, a judiciary "with substantial and independent powers, secure against all corrupting or perverting influences; *secure also against the arbitrary power of government itself.*"

Recognition that an independent judiciary is numbered among the essential elements and institutions of any constitutional government has even been accorded by enlightened monarchs.

Louis XII of France, in his Edict of 1499, concerning high courts of justice, ordained that the law should always be followed *in spite of royal orders, which, as the edict says, importunity may have wrung from the monarch.*

Frederick II of Prussia in a letter to the Supreme Court of his kingdom enjoined its members to be faithful to their oaths and to do justice *in spite of royal demand.*

"THE JUDICIAL VETO"

One of the "substantial and independent powers" which the Court claims and exercises is that of denying effect to an act of Congress if it transcend the powers given by the Constitution. This power, that is viewed as a usurped power by some—a view from which I dissent—is in my judgment the cornerstone of the American constitutional concept of liberty under law, and as formidable a barrier as was ever devised against the tyrannies of political assembles and executives.

The President tacitly puts in question the constitutional legitimacy of this power in his "Fireside Chat."

How firm the conviction is that this power is generally regarded to be an essential power is evidenced by the fact that the State of Georgia has included in the Bills of Rights set up in its Constitution this declaration: "Legislative acts in violation of this Constitution, or the Constitution of the United States are void, *and the Judiciary shall so declare them.*" This power now exercised for almost one hundred and thirty-five years might have been withdrawn at any time through the process of Amendment. It has not been so withdrawn. Failure to so withdraw it may reasonably be urged to evidence recognition by the people that it was granted, as claimed, by the Constitution. The bill strikes at independence in the exercise of this power. It is based upon resentment at the exercise of this power. The bill is admittedly primarily directed at the present membership of a Court that, sometimes unanimously, and again in division, has in the exercise of this power denied effect to acts of Congress running counter to the Constitution as interpreted by the Court, even though such acts might have found justification under the theory of the Constitution and its purposes formulated by the President. The bill strikes directly at those of them who have reached the prescribed retiring age and period of service and who fail to retire, by providing for the appointment of added judges.

The added appointees will in the nature of things be men whose minds are at the time of appointment believed to run along with that of the President. They again, in the nature of things, will be looked to, to offset and cancel the votes of such non-retiring judges in cases in which the minds of the latter do not run along with that of the President or give effect to his theory.

If the six judges now of retiring age and years of service or any of them accept the "invitation" to retire the same factor of according views will influence the appointments of their successors and the same result of conforming judgments to the President's theory will be looked for.

"PSYCHIC COERCION"

The taking into account by a President of the views of his appointees cannot, where appointment comes in ordinary course, be fairly criticized. It has always been so. It will probably always be so. Utopia and the perfect State and perfect man still lie in the future. Under ordinary conditions, of gradual changes in the Court over the years through death, resignation, retirement or impeachment, the factor of taking into account by the appointing power of the views of appointees will in general be without significant baneful effect. What is now proposed—quite a different thing—is that Congress by deliberate affirmative action seek to effect through an "invitation" having the characteristic of "psychic coercion," the retirement at one fell swoop of two-thirds of the judges now constituting the court and the appointment of successors or, in case of their failure to retire, to add a new appointee for each one failing to retire, with the declared purpose to bring the judgments of the court into harmony with "a present day sense of the Constitution" to use the words of the President, which words can only be interpreted as requiring harmony with the President's wide-flung theory of constitutional Congressional power.

In this situation the factor of conforming views in the appointees raises a threat, not ordinarily involved, to judicial independence in interpretation and application of the Constitution.

INCREASING NUMBER OF JUDGES AS A MEANS OF PUNISHMENT

In this connection a startling statement made the other evening by a member of the Senate in support of the pending bill ought not to pass unnoticed. He said: "The proposed change in the number of judges is within the power of Congress. . . . Such changes constitute a part of the check and balance system provided in the fundamental law along with the power of impeachment . . ." In this statement there is a strange coupling of the power to change the number of judges and the power of impeachment. The power of impeachment is a power to punish. Was it intended by so joining together the power of impeachment and the power to change the number of judges, to express the conviction that the latter power was also designed by the Constitution to be exerted in punishment—punishment by Congress cooperating with the President of those members of the Federal Courts whose minds do not run

(*Continued on page* 389)

AMERICAN BAR ASSOCIATION JOVRNAL

BOARD OF EDITORS

EDGAR B. TOLMAN, Editor-in-Chief.....Chicago, Ill.
R. E. LEE SANER, Chairman.....Dallas, Texas
FREDERICK H. STINCHFIELD, President, Ex-Of.....Minneapolis
GEORGE MAURICE MORRIS, Chairman House of Delegates, Ex-Of.....Washington, D. C.
HERMAN OLIPHANT.....Washington, D. C.
GURNEY E. NEWLIN.....Los Angeles, Cal.
CHARLES P. MEGAN.....Chicago, Ill.
WALTER P. ARMSTRONG.....Memphis, Tenn.

Subscription price to individuals, not members of the Association, $3 a year. To those who are members of the Association the price is $1.50 and is included in their annual dues. Price per copy, 25 cents.

JOSEPH R. TAYLOR
MANAGING EDITOR
Journal Office: 1140 N. Dearborn Street
Chicago, Illinois

PUBLIC DISCUSSION OF THE COURT ISSUES SHOULD CONTINUE

With the closing of the hearings before the Judiciary Committee of the Senate, the great issues as to the Courts of the United States approach the stage where the proposals will be put in form for legislative action and the lines will be drawn more definitely for the decisive voting. Although the outcome may still be several months away, the developments during May seem likely to determine the form, and perhaps even the fate, of the proposals on the final roll-calls. Under such circumstances, it is of the utmost importance that the active public discussion of the Court issues, and the emphatic manifestation of public opinion thereon, shall proceed with unabated vigor in every State, during May and June and until the great decision has been made by the Congress.

The consideration of the proposal as to the Supreme Court has presented an anomalous situation that has made great numbers of people deeply anxious and disturbed. During the past one hundred and fifty years, there have been several great issues which involved the basic policy of the country and which precipitated acute controversies in the forum of public opinion. In the first instance, such discussions have usually centered in the Congress; but always heretofore there has been an awareness that sooner or later the issue would come to the States and the people for their decision, in accordance with the spirit of the Constitution and commonly in compliance with its express requirement. Realization that the most cherished of the instrumentalities of free government, and in vital respects the charter and form of that government, can be and may now be changed without the action of the States or the people, has brought a sense of shock and of bewilderment and anxious questioning whether anything can be done to prevent such a step.

That the proposal as to the Supreme Court and the other Federal Courts was so formulated that there would be no referendum to the country unless the Congress changed the proposal or became willing to let the people vote on it, has compelled an unusual type of informal referendum—a Nation-wide expression and communication of the view of individual citizens, in an unprecedented volume and from all parts of the country, to the President and to the members of the Senate and House of Representatives, for and against the proposal. The fact that three months' consideration of the proposal, in the Congress and before the country, finds the opposition stronger and more hopeful than at any time since the Message of February 5, 1937, is the best confirmation of the effectiveness with which great numbers of citizens, of every occupation and station in life, and in every State, have made known their views to their representatives in Washington.

The American Bar Association has never fulfilled a more useful public function than during the past two months, in contributing as it could to this impressive revelation of the opinion of the people without regard to party, locality, age or vocation. That in every State —South as well as North, West as well as East—the lawyers who do not belong to the American Bar Association and the lawyers who are in the ranks of the Association joined hands against the proposed re-making of the Nation's great Court, stands as a significant contribution to the great referendum. The decisiveness of the vote among 72,000 lawyers cannot be explained away. If the proposal had merit, it would surely have found support in

some State, or among either the juniors or the seniors of the Bar, or among the non-members if not among the members of the American Bar Association. From all reports, the thousands of letters which have reached Senators and Members of Congress, from their aroused constituents, have been in even greater ratio against the re-making of the Supreme Court.

It is to be hoped that this active manifestation of public opinion will not die down as warm weather sets in. When the proposal as to the Supreme Court first aroused widespread public alarm, men of mature political judgment said that such spontaneous, unorganized protest would not last long; that the average citizen would be content to write and send one or two letters of remonstrance; and that within a few weeks or months it would appear that public interest in the matter had waned. This normal expectation has not been fulfilled thus far; and both the proponents and the opponents of the pending proposals ought to see to it that public opinion is increasingly manifest, as the issue comes to the stage of decision.

Continued public discussion of the pending proposals, at public meetings under nonpartisan auspices, in every State and locality, is a natural aftermath of the formal hearings concluded by the Senate Committee, and should be encouraged and sponsored by both sides, so that the vital issue and the developments concerning it are fully understood by the public. In some States, excellent arrangements have already been made to intensify these discussions during May and June. In Connecticut, announcement has been made of two great mass meetings of citizens on the Court issue. The meeting in New Haven will be addressed by Senator Burke of Nebraska, and the meeting in Hartford will be addressed by Senator Bailey of North Carolina.

It is reported also that each meeting will be presided over by the Mayor of the city in which it is held. The fact that these municipal executives as well as the principal speakers, are members of the same political party as the proponents of the Court proposal, attests the extent to which normal political affiliations are being obliterated, in the defense of an institution which knows no partisanship or sectionalism and is a bulwark of the liberties of the whole people.

Other States will do well to follow the example of Connecticut in keeping the issue before the public and in intensifying the opposition to re-making the Court. It is unfortunately true that in some localities the leaders of public opinion, including the lawyers, have done little to vocalize the protests and bring them to attention in Washington. Men and women who say they feel deeply on the issue have been content to do nothing whatever in defense of the Court. This is the time, however, when their belated activity will count most.

From the first, the American Bar Association has urged that the view of all citizens, whether for or against the re-making of the Court, should be freely and fully expressed, to those with whom the decision will rest. That recommendation is renewed, for the coming weeks and months.

The Association has urged that in the public discussions, both sides should be fairly represented and fully presented. In pursuance of that policy and for completeness of information, this issue of the JOURNAL contains able and authoritative presentations of the arguments in favor of the proposal as to the Supreme Court, as well as further articles in support of the position so decisively voted by the membership of the Association and confirmed by the poll of non-member lawyers.

Prompt arrangement for occasions when the Court issues are to be discussed publicly in the various localities becomes increasingly advisable, by reason of the probability or possibility that the definitive bill or bills to re-make the Supreme Court will be brought to the floor of the Congress, by sponsors of the proposal, in a form and purport substantially different from that of their original submission, on which the opinion of the public, including the lawyers, was first elicited. It is likely also that various alternative or substitute expedients, designed to accomplish similar results in a different way, will be broached for legislative consideration; and the claim will be made

that no expression of public opinion has taken place in opposition to these alternatives, even though they are scarcely less objectionable and subversive than was the original proposal. It also may develop that proposals will be brought forward which would give to the States or the people an opportunity to pass upon the matter, and which, upon full discussion, would be found to be acceptable as submissions to the people for solution of the controversy as to the Court.

The changed and changing phases of the proposals should be openly and democratically considered, on their merits, in the forum of public opinion; and a sound and militant consensus of opinion should be reached and made manifest. Undoubtedly there will be need, during at least May and June, for the manifestation and expression of an informed public opinion as to some of these alternative suggestions, along with the reiteration of emphatic opposition to anything resembling the original proposal. There is need also for considering whether the original proposal should be separately adopted as to the other Federal Courts, though defeated or modified as to the Supreme Court. In all of these matters, we are sure that in every State the lawyers will be found to be ready and able to act with other citizens, in continuing the fight to save the fundamentals of an independent, non-political judiciary in the United States.

THE ASSOCIATION'S RECORD IN THE CASE

The part which the American Bar Association has played in the democratic defense of "the Gibraltar of American liberties" has given an added prestige and significance to action taken by the Association, and it has become usual for the sponsors of some particular "compromise" plan to assert that the Association has never taken action against it. Occasionally, such representations go to the point of assertions that the Association has actually favored some proposal that is directly repugnant to the views expressed by action of the Association. Members of the profession of law should be alert and emphatic, in protesting and correcting promptly all such misrepresentations.

To illustrate: It is maintained stoutly, by some, that the adverse action taken by the Association through its recent referendum to members was related only to increasing the number of Justices of the Supreme Court "in the manner proposed" in the Message of February 5, 1937, and that the Association has never voted upon the question of a "fixed increase" of the Court to eleven or more members, as contrasted with the proposed "flexible" or conditional increase. The referendum necessarily was related to the specific pending proposal for increase; but if anyone can interpret the overwhelming votes cast by American lawyers, in and outside the Association, as indicating that they are opposed to a "flexible increase" but hold no views against a "fixed increase" of the Court to eleven or fifteen members for any such reasons as have been urged in behalf of a "flexible increase," we can say only that we find in the figures no support for such an interpretation.

As recently as August of 1936, moreover, members of the Association present in Boston, at the most largely attended annual meeting ever held by the Association, voted upon bills providing for a "fixed increase" in the Court. A bill was then pending in the Congress to increase the Court to eleven members, another bill proposed to increase the Court to fifteen members. The Association's Standing Committee on Jurisprudence and Law Reform enumerated these bills (1936 Annual Report Volume, page 659) and recommended that they be emphatically disapproved.

A copy of the report and recommendation was sent to every member of the Association, at least two months before the Boston meeting. At the last session in Symphony Hall, the report was presented for action; and the Chairman of the Committee spoke earnestly of the dangers inherent in proposals to increase the membership of the Court (*Ibid,* pages 196-197). Lawyers now identified with the pending proposals to enlarge the Court were at the meeting, but gave no indication in August that any such thing was to be broached in February. The resolution disapproving both

the bill to increase the membership of the Court to eleven and the bill to increase it to fifteen members was adopted unanimously (*Ibid,* page 198).

The state of the record is similar as to bills or amendments requiring the concurrence of more than a majority of the Supreme Court, to adjudge a statute to be unconstitutional. The Committee enumerated the bills of this character which were pending, for a two-thirds or three-fourths vote for invalidity (*Ibid,* page 660), and recommended that they be disapproved. The Committee said (*Ibid,* page 661):

> "Once require that more than a majority of the Justices shall concur and the authority of the Court *qua* Court to pass upon constitutional questions is undermined, the principle of majority rule is flouted and a minority enabled to prevail."

The recommendations were sent in advance to each member of the Association, and were presented also orally to the meeting, by the Chairman of the Committee (*Ibid,* page 196). Disapproval of these bills was unanimously voted (*Ibid,* page 198). Although it will be recognized that recent discussions may have won for the two-thirds vote some popular support it did not theretofore have, it remains true, as to the American Bar Association, that unless and until the 1936 action is abrogated or altered through a referendum to the membership or by action of the Assembly and the House of Delegates at a subsequent meeting, the Association is in opposition to such a change in the functioning of the Court. It may well be that before long the membership of the Association will be asked to vote its present views upon this and other proposals.

The most persistent of the current misapprehensions is that in 1921 the American Bar Association approved or recommended an increase in the size of the Supreme Court. This assertion has been repeatedly denied, and should be denied by Association members whenever it reappears. In 1921, a Committee of the Association discussed the serious congestion and arrearage then existing in the work of the Court, and reported several ways in which that condition could be remedied. One of the methods enumerated was an increase in the size of the Court, but the Committee did not recommend that method or ask a vote on it. The 1922 meeting of the Association approved and recommended to the Congress (1922 Report Volume, page 362) the method which was enacted into law and has proved completely efficacious. The Association did not then vote upon increasing the size of the Court. The 1936 meeting voted unanimous disapproval of an increase to eleven members or to fifteen members.

It would be too much to expect that such criticism and discussion as has taken place as to the Courts during the past few months could have a salutary effect upon the administration of justice or would increase popular respect for the Courts as arbiters of "equal justice under law." Whatever damage has been done by way of impugning and impairing the confidence of the people in their Courts can be repaired, if at all, only through time and sustained effort. Nevertheless, it may be that the great debate will give the people a new appraisement of the importance of an independent, non-political judiciary, and of the counterpoise which is fundamental in our federal system. These partly compensating gains may be realized if the current discussion proceeds without rancor or distortion, disregards personalities, is kept closely to the merits of issues, and goes forward in the American spirit of tolerant and friendly consideration on both sides.

THE MINORITY VIEW PRESENTED

In accordance with the established policy of the Journal to give both sides a hearing, we print in this issue two articles in support of the President's views as to the Supreme Court: one by Mr. Thurman Arnold, Professor of Law at Yale University and Special Assistant to the Attorney General, and the other by Mr. Charles S. Collier, Professor of Law at The George Washington University.

Of course it will be understood that the Journal supports without reservation the policy of the Association as to the President's proposal, adopted by an overwhelming vote in the recent referendum, and that the publication of these articles is not to be taken as an endorsement by the Journal of the views therein expressed.

THE CONSTITUTIONAL CRISIS—THE CASE FOR A SYNTHETIC SOLUTION

Viewpoints from Which the President's Proposal May Be Approached—Question Here Considered for the Most Part as a Practical Problem of Establishing a Reconciliation on Some Basis or Other Between the Courts and the Political Leaders—Present Constitutional Crisis in a Practical Sense Is Unique—Three Fundamental Trends That Lie Behind the New Deal Program—Three Chief Solutions of Situation Proposed by Different Schools of Opinion—Objections to Method of Constitutional Amendment—Modification of President's Proposal, Limiting Number of Appointments, Suggested, etc.

By Charles S. Collier
Professor of Law, The George Washington University

THE President's message of February 5, 1937, advocating various important changes as to the federal judiciary, has precipitated a great flood of discussion. It is difficult to summarize this discussion, and one is tempted, at this stage of the controversy, to offer some detailed comment on some selected phase of the matter. But in view of the declared sympathies of most members of the American Bar Association, it seems preferable, after all, to attempt a general outline of the argument on the subject, though this must be reduced to a scale proportionate to the limited space available for the present statement.

At the outset, it should be noted that the President's proposals cover several phases of the organization and practical work of the judiciary. The center of interest, however, is to be found in the effect upon the membership of the Supreme Court of the United States that may be expected to result from the proposal to authorize the appointment by the President and Senate of new justices to the Supreme Court, without waiting for the death or resignation of the incumbent members. It is to this aspect alone of the President's proposal that this article will be devoted.

The problem that has given rise to the President's proposal may be approached from either one of two viewpoints. It may be regarded merely as a problem of bringing about a practical reconciliation, on one basis or another, between the views of the federal judiciary, as to constitutional principles and methods, and the views entertained on the same subjects by the dominant political leaders established in power in the executive and legislative branches of the Government. Or the problem may in the alternative be regarded as a matter of determining, by some course of statesmanship, what general view shall be established in practice as to the interpretation of the Constitution, the choice lying between two or three general views advocated by large groups of instructed persons. It is not possible, within the limits of a very short paper like the present, to discuss the issues adequately from both of these viewpoints separately. I shall endeavor to view the matter for the most part as a practical problem of establishing a reconciliation on some basis or other between the courts and the political leaders. The primary and immediate problem is one of establishing conditions under which there may be a measure of harmonious cooperation as between the political and the judicial branches of the Government. In planning to establish that harmony, however, one is almost necessarily influenced by the *values* which he himself finds in the views expressed by the contending elements as to the general standards of constitutional interpretation that should control judicial action. One is apt to favor "harmony" on a basis that aids the realization of his own political ideals.

The problem should be approached in the concrete, and the concrete fact is that the present constitutional conflict is in a practical sense unique. For this reason, argument from analogy is at a discount in the discussion of this great issue. Lawyers are perpetually asking how a rule invoked in one situation would work in other analogous situations. This is all very well in matters where two prerequisite conditions are satisfied, namely, (a) that numerous instances occur in which the rule may be invoked, so that it is better to have a steady rule and thus avoid repetitious reasoning; and (b) that "certainty" in the rule is a primary *desideratum*, as in ordinary commercial affairs. Neither of these conditions obtains with regard to the present problem, for (a) there have not historically been numerous instances of such a serious conflict between the political branches of the Government and the judiciary—indeed, the situation is really without precedent. And (b) the element of *certainty* in the content of the applicable rules is clearly *not* the element to be regarded as the controlling consideration with reference to *constitutional crises*. For example, who would

argue that the abdication of Edward the Eighth of Great Britain was a bad thing because the principles that the abdication represents are not easy to formulate with nice legal precision, so that a luminous precedent can be extracted for the guidance of future generations?

The present political and constitutional crisis in the U. S. may be regarded as a sort of quarrel between politics and the law. Without attaching any conclusive value to the forces that lie behind the political program, whose advocates have come into conflict with the courts, it is desirable to pause a moment to estimate these forces. The practical arrangement for harmonizing conflicting forces must take account of the power and persistence of those forces.

There are three fundamental trends that lie behind the "New Deal" program. One of these is a general socializing tendency, a trend toward increased social solidarity, which is manifested all around the world, and not merely in the United States. It has been at work in our country for many years, and marks a recession from the extreme individualism in theory and practice which has been prevalent in our country up until recent years. This tendency manifests itself in such diverse programs as workmen's compensation laws, minimum wage laws, programs to support and stabilize the agricultural population, old-age pensions, and liberal relief for the unemployed. The second tendency is the outcome of the depression itself. It is a powerful trend in public opinion that favors measures calculated to prevent the recurrence of great depressions. This tendency produces such results as unemployment insurance laws, laws to limit speculation and to control the conditions of currency and credit more adequately, and taxes to prevent the accumulation of surplus accounts of corporations. The third trend in public opinion is the increased interest in the conservation and development of national resources. To the influence of this trend we may attribute such recent measures of Congress as expenditures for soil conservation, for the development of streams and water power, and for the Civilian Conservation Corps, regarded as an enterprise to conserve the forests and other natural resources.

These three trends have produced a formidable body of public opinion in support of laws that trench upon established notions of the rights of private property and of independent business activity. Our constitutional law, as traditionally developed, contains many propositions that seem to apply as limitations on the power of the political branches of the Government to establish measures of the types above indicated. Of course, some of these measures have not as yet been subjected to any fatal judicial interference. But many of the laws growing out of these trends in public opinion have been already nullified by judicial action, and many more seem to be in deadly peril from the possibilities of judicial attack.

During the Roosevelt Administration, the so-called "New Deal" measures, which in a general way are the outgrowth of the three great tendencies in public opinion above referred to, have encountered a fairly complete judicial blockade. The blockade has been modified somewhat since the election of last November. But the impression of the blockade has continued, and was undoubtedly the activating force that led the President and his advisors to include in the proposals with regard to the judiciary the particular paragraphs that would, if adopted, make possible the alteration of the personnel of the Supreme Court. Just before the presidential campaign of 1936, there seemed to be a pretty complete deadlock as between the policies and purposes of the President and the majority groups in Congress on the one hand, and the controlling judicial groups on the other hand. It was to break this deadlock that the President felt impelled to submit proposals with regard to the judiciary that have at least the potentiality of doing away with the contradiction between the views of our political leadership and the views of the judicial exponents of authoritative constitutional interpretation.

For the removal of this deadlock, and for the establishment of a more satisfactory basis for our future political and constitutional development, three chief solutions have been advocated by different schools of opinion. The first of these may fairly be called the conservative solution. Its real principle is that the conflict between law and politics should be terminated by the complete surrender of politics. The "solution" advocated is simply that the judicial supremacy should be preserved to the fullest extent, and that the decisions of the judiciary as to constitutional issues should in practice be accepted as absolutely final. An important group of lawyers adopt this view. They may refer occasionally to the possibilities of amending the Constitution, but they do not actually favor any amendment. Their view is that the present economic and social situation does not call for any fundamental changes. They feel, however, that there might be some improvement in the affairs of Government if the control of the judiciary were made even more complete and pervasive than it has been hitherto. For this reason, while constantly stressing the need for stability in the distribution of governmental power, they actually seek to induce the judiciary to assume new forms of jurisdiction and new areas of control, so that the political branches may be blocked at every point. This tendency is illustrated, for instance, by the expansion of judicial jurisdiction that was requisite to enable the Supreme Court to decide in a law suit the fate of the Agricultural Adjustment Act. The jurisdictional holding in United States v. Butler, 297 U. S. 1, involved a departure from the whole spirit and principle of the familiar decision in Massachusetts v. Mellon, 262 U. S. 447. In a sense, the Butler decision was a striking instance of judicial radicalism. Again,

the use of injunctions to restrain governmental action in various spheres has been a rapidly developing phenomenon. Such novel assertions of judicial power are applauded by these conservative lawyers. It is therefore fair to say that they favor the actual increase of judicial power and the full consolidation of judicial supremacy in all really important matters.

The difficulty with this view that the judicial supremacy should be preserved intact and that the existing economic and social arrangements should be modified only in accordance with principles developed by juristic tradition and enunciated as rules of constitutional law is that it does not allow sufficient scope for the factors of rapid social and economic change. It exalts so greatly the importance of judicial tradition that political action is reduced to a minor and subordinate role and has only a tentative and conjectural validity. This view is essentially an impractical view. The world does move. Social tendencies drive ahead rapidly. The lawyers, who are a conservative class throughout, find their minds turning to the conservation of property rights and the interests of the established classes who make up the most desirable groups of clients. The juristic tradition, as actually developed in the United States during the last fifty years, has been lacking in true philosophical character, since it has reflected the views of a special class, and has been associated chiefly with particular and limited economic and social interests.

It might be remarked also that the idea of unchecked judicial supremacy cannot be a complete solution for our present difficulties, for the reason that this idea has in fact been already tried all through President Roosevelt's first administration, and it is the "defects of its qualities" that have brought about the present serious alienation as between the political branches and the judiciary.

The second solution or basis for reconciliation between the politicians and the judges is the much-discussed possibility of amending the Constitution. Of course, a great deal depends on what amendments are suggested or are supposed to be capable of adoption. It is impossible to discuss these various suggestions adequately in the present paper, but certain comments may be offered that tend to show that the method of amending the Constitution cannot serve as a practical solution for the present crisis.

In the first place, there is no consensus of opinion as yet in Congress itself as to what these amendments should cover, or what principles they should embody, much less is there any consensus of opinion among the people at large as to the content or the expediency of these amendments. Hence, the adoption of such an amendment or amendments to the Constitution can hardly be said to offer a practicable, *present* alternative to the President's plan. It belongs to the future. The difficulty is not one of draftsmanship or detail, but is fundamental, and results from the complete immaturity at present of opinion on this subject of constitutional amendments.

Second, it may fairly be urged that there is no inconsistency between adopting the President's proposals now and working diligently at the same time to formulate constitutional amendments which can then be submitted with the hope, but without any certainty, that they will be disposed of more rapidly than the Child Labor Amendment of 1924 or the Income Tax Amendment of 1909. The two processes are mutually complementary. The amending process will provide the new wine, which should not, as the Scriptures advise us, be poured into old bottles. The changes in judicial personnel will provide the new bottles into which the new wine of novel constitutional enactments can be safely poured.

But there is a third objection to the method of constitutional amendment as a solution for the present situation, namely, that even the speedy adoption of concrete amendments establishing additional governmental powers would not in itself remove the chief grounds of the present conflict, for the reason that the conflict is chiefly due to the judicial state of mind. Judicial action is, of course, not simply a hypnotized response to particular phrases and words in the Constitution or in other enactments. The course of decisions on constitutional issues in the Supreme Court depends more upon juristic traditions than it does upon any positive enactment, even when this enactment takes the form of a constitutional amendment. This juristic tradition may be characterized as philosophical and unfettered interpretation of the constitutional text, as distinguished from a meager literalism of interpretation, or it may be characterized as free creative law-making by the judges, according to the view that one may prefer. At any rate, it has a life and movement of its own, often taking the judges far afield from what historical evidence seems to indicate was actually intended or contemplated by the framers of constitutional amendments or other enactments, and in the last analysis, seems to represent a volitional choice by the judges from among several views, each of which was, before this choice, a possible view and capable of plausible justification. There is, in such cases, a conscious and wilful selection of the view ultimately to be declared the law, the controlling rule thenceforth to be applied by inferior courts and by executive agencies in dealing with like situations.

The decisions of the Supreme Court on novel constitutional points therefore rest largely on the volitional choices by the judges among possible alternatives. What determines these choices is a matter of curious study, but it seems clear from an examination of leading cases decided by the Supreme Court, during the last twenty-five years especially, that this process of judicial choosing differs with different judges. We thus come back to the obvious fact that it makes a great difference who the judges are. The question of

personnel is vital. The development of constitutional law will differ radically during the next few years, according to the personal outlook of the members of the Supreme Court.

Still a fourth objection to a policy of reliance on constitutional amendments exclusively may be advanced. It must be admitted that the resort to constitutional amendments means submission to the possibility of minority rule. Such amendments, however meritorious, may be defeated by legislatures or conventions in thirteen of the States, as against affirmative votes in thirty-five of the States. It is true that this handicap must be accepted and this risk must be borne in cases where it is strictly necessary. If there were absolutely no way in which it was possible to proceed other than to secure constitutional amendments, we should, of course, have to try that method. But it is not true that there is absolutely no other possibility open in the present crisis. The President's plan presents a practical and constitutional alternative, though it rests on the ordinary legislative process alone.

It may be remarked parenthetically that the framers of the present Constitution did not, in submitting their proposed constitutional text, follow the method specified for amending the Articles of Confederation, the previously existing Constitution. Thus, they acted in an unconstitutional manner, and the adoption of the Constitution of 1787 was in itself an unconstitutional act. The previous constitution, the Articles of Confederation, could only be amended by the unanimous vote of all the States. In order to avoid the possibilities of minority rule, so obvious with that method of amendment, the patriots who formed our present Constitution prescribed that it should go into force when adopted by conventions of nine out of thirteen States. We thus have an important precedent for the view that it is fair to avoid the difficulties of the process of constitutional amendment if these difficulties seem to serious.

But in connection with the President's plan, it should be stressed at this point that there is no serious contention that this plan is really unconstitutional, that it violates in a legal sense the requirements of the Constitution. It is therefore not *necessary* to resort to a constitutional amendment if the President's plan, a purely legislative project, is adequate to meet the situation.

Resort to the method of constitutional amendment would mean that the socializing programs of the New Deal were to be exposed for the third or fourth time to the tender mercies of the enemies of the New Deal. Why should the President put his program in the hands of his opponents? His enemies ought to be able to control several States, perhaps a fourth of them. Why should the President expose his programs to the risk of a veto by a small minority of the people? There has been nothing in the attitude of the President's political adversaries that would encourage him to follow such a course. Unless one attaches a sort of special value to the process of getting constitutional amendments, as if that were an end in itself, it seems reasonable to look for some other solution than this cumbersome and difficult one in order to liquidate the present critical situation.

The third general solution for the fundamental conflict is to be found in the proposition that the personnel of the judiciary ought to be altered. This is essentially what the President's proposal involves.

In favor of this view, we may cite, firstly, the fact that alternation of personnel is the course that would be adopted in any other situation in political or business affairs. If an administrative organization in Washington or a political delegation from a particular State in the House of Representatives is not functioning so as to harmonize with other factors in the governmental set-up, the natural solution to be first tried is to place other personalities in the key positions. Opponents of the President's plan must maintain that the judiciary is an exception to this general principle which is a product of human experience. It is true that the Constitution provides that the judges shall hold office during good behavior. But this requirement is not violated by the President's plan. No judge is to be removed. Others are to be added. So long as the positive and concrete requirements of the Constitution are not to be violated, we still have room for the general principle derived from human experience, that a change in personnel is a reasonable and effective method for relieving conflicts in the operation of all human institutions.

Secondly, a change of personnel is what has in fact happened in previous crises in the history of the country. Through the operation of death or resignation on the part of the incumbents of high judicial office, previous Presidents have had the opportunity to infuse new blood into the courts, in much the same way that President Roosevelt desires to do without waiting for death or resignation to remove the existing incumbents of high judicial office. For instance, in the Civil War period, President Lincoln had the opportunity to appoint five new judges because of death or resignation of the incumbents, plus the fact that one new judgeship was created. President Lincoln was thus able to secure a change in the judicial personnel that corresponded to the critical change in public policy that occurred in connection with the war. Space forbids the development of the historical comparisons, but it may be remarked that every President prior to the inauguration of President Roosevelt, with the isolated exceptions of William Henry Harrison, Zachary Taylor, and Andrew Johnson, (none of whom served a full term), has had the opportunity to appoint new judges to serve on the Supreme Court. The infusion of new blood has been a regular process, facilitated in many instances by the timely resignation of the other men, who perhaps felt that new appointments would produce a court more in consonance with the newer political tendencies. In

President Roosevelt's administration, no such vacancies have been created.

Thirdly, it may be remarked that the change in the present personnel of the Supreme Court will eventually happen in a very few years in any event. The President's proposal, from one point of view, telescopes the process, and accelerates the time of possible appointment of new judges. It is a favorable argument of conservatives that the President's proposal is unnecessary because he, or some other like-minded successor, will have an opportunity later on to appoint justices of the Supreme Court if they will only be patient. Of course, one answer to this suggestion is that if the present personnel of the Supreme Court is to be supplemented anyhow, why is it so vitally important to delay the process?

Fourthly, it should be emphasized that the change in judicial personnel proposed by President Roosevelt leaves the legal and practical position of the Supreme Court as an institution wholly untouched. Judicial review of the constitutionality of legislation is left unaffected. The existing powers of the Supreme Court remain entirely intact. They merely are to be exercised by other personalities.

A fifth point to be stressed with regard to the change in personnel is that it will be *effective* in all probability to accomplish a fair measure of reconciliation between the political branches of the Government and the judiciary. Candor suggests the statement that the present conflict has been largely due to a special situation in the membership of the Supreme Court. Four conservative judges vote regularly and persistently on the vital constitutional issues as a conservative bloc, and need only to win the accession of one additional justice in order to hold unconstitutional measures passed by Congress and considered vital to the fulfillment of the policies of the New Deal. It is not likely that the rigidity of this group would be duplicated in new appointments. It is not probable that the new justices will be as strongly predisposed in favor of the New Deal as some of the old justices are predisposed against it. But the presence of a group of judges selected by President Roosevelt will, of course, strongly tend to mitigate the conflict of opinion between the politicians and the judges. Thus the President's plan will probably be effective in this sense, and will terminate the judicial blockade against the socializing measures favored by the dominant elements in contemporary public opinion.

The above review seems to indicate that the method of changing the judicial personnel by the addition of new judges is a simple and practicable and constitutional expedient which is likely to terminate, or at least greatly alleviate, the fundamental conflict between the political branches and the judiciary. But it is most earnestly urged that the change is short-sighted and will involve more harm than good in the end. It is argued that the principle of altering the personnel of the judiciary with the purpose of altering the course of decisions is so vicious that it will undermine the authority of the court and will constitute a bad precedent that will assist some future aspirant to dictatorial powers to ascend to dizzy heights of executive authority. I hope the reader will pardon me for the assertion that I have throughout the course of the pending controversy endeavored to give earnest consideration to these criticisms. I have come to the conclusion that the President's plan, as submitted, should preferably be safeguarded by an important modification. I believe that this modification will not interfere with the practical effect of the President's plan in producing real improvement in the efficiency and harmony of governmental processes in this country, as discussed in the preceding paragraphs. But the modification will forestall possible evil consequences that otherwise might flow from the adoption of the President's project. It ought, also, to conciliate intelligent conservatives.

This modification is simply that the plan should be changed so that no one President should have authority to appoint more than three judges, pursuant to the new statutory provisions; (that is, independently of the question of vacancies caused by premature death or resignation of justices from out the existing number. In these latter cases, the President should have the right to nominate a successor, just as the Presidents have always done in such cases).

The reason for suggesting this modification is very simple, but fundamental. The argument has constantly been made that the President's plan would lead to the result that the Supreme Court would be "packed" in favor of the Government in all crucial cases. On the other hand, the President describes his plan as being a project "to infuse new blood" into the judiciary. The two phrases have entirely different connotations, and suggest very different ethical values. Which is the true designation of the plan? It seems to me that a great deal depends on the number of judges to be added. If only three judges were to be added by any one President, this power in itself could never enable the President to dominate or control the court, even supposing that he was able to secure the ratification of the nomination of men who would be subservient. If the pessimistic conjectures of enemies of the President were fulfilled, and the new appointees were not comparable to the existing membership of the court, either in intellect or in patriotism, they could easily be outvoted. If, on the other hand, the optimistic predictions of the President's supporters were realized, and the new appointees were really outstanding legal scholars or statesmen, they would contribute an invaluable element of added strength to the court. Although they might produce a trend of decision more favorable to the New Deal, this could only be accomplished if they were supported by the so-called "liberal wing" of the present

court membership, a group in which all parties of the present dispute claim to have great confidence.

Much has been written about the harmful tendency of the President's proposal, viewed as a precedent. But it seems that a law providing for a new method of appointment whereby the President would have the opportunity to appoint only three new judges to the Supreme Court, could not in itself constitute a harmful precedent. Precedents have to be followed intelligently and strictly. The possibility that some dictatorship might arise under different economic and political conditions in the remote future cannot be forestalled by the anxious observance of legalistic niceties at the present time. But we may properly confine ourselves at the present juncture to action, which viewed accurately and in an intelligent way, would not constitute a harmful precedent. We may properly try to act in the present crisis so that conscientious patriots of the future may not be misled by the apparent success of an experiment dangerous in principle. The precedent of appointing three new judges, constituting a small minority of the total membership of the court, if fairly and intelligently followed as a precedent, could not possibly prove dangerous at any future time.

On the other hand, it may be admitted that if the President were given the opportunity to appoint six new judges, a very large proportion of the total membership, this might have the result that the new appointees would dominate the decisions of the court. The appointment of dominating majorities by new laws does seem to involve a dangerous principle that might lead to harmful results in the future, if followed, as a precedent.

Many persons who have discussed the President's plan have raised the cry of "no compromise". It seems to me that this is an unfortunate slogan. The President's plan has its merits and it has its risks. Why can we not attempt to conserve its merits and avoid its risks? I do not believe that the President himself would object to this type of criticism. Why should he? The authority to appoint three new judges would enable him to infuse new blood into the court in the sense which that term properly suggests. It will enable him to establish a counterpoise in the membership of the court as against the consistent reactionary influence of the well-known quartet of conservative judges. The balance of power would then be left in the hands of the liberal group in the present membership of the court.

Personally, I do not share the fears that many have expressed that the new members to be appointed by the President, if his plan is adopted by Congress, will be extremists or will be incapable of independent and intelligent action. The President is not likely to make such appointments. He must act in view of his public and historical responsibility, and he must also secure the confirmation of the Senate for any candidate suggested. But even if it should happen because of the perversion of the appointing function that an unsatisfactory group of appointees should reach the Supreme Court through the adoption of the President's plan, this possibility, which I personally regard as the product only of hostile partisan imaginations, would necessarily prove controllable if the new appointees were limited to three.

In view of the great benefits to be obtained from the infusion of new blood into the court at the present time, and in view of the fact that the dangers involved in the plan when analyzed are capable of elimination through a modification of the President's original proposal, it seems clear that the hesitancies produced by habit and familiar custom should not deter patriotic statesmen from supporting the action which constitutes the essence of the President's proposal. The gist of the matter is that the proposal, subject to the modification that I have suggested, is a constitutional proposal to attain a legitimate end by appropriate means. It is a proposal which is calculated to produce a true reconciliation on reasonable grounds between the political branches of the Government and the judiciary as to constitutional and practical issues of the greatest moment. It is a proposal which cannot under any circumstances by its own force alone produce any serious harm, either in the present crisis, or by operating as a precedent, so long as its true character is fairly and intelligently considered by those who allow themselves to be controlled by precedents.

Defense of Our Constitutional System

(*Continued from page* 346)

require change. The states must be free to act within their proper fields; the national government must be able to deal with problems that are national in character; and, because of the need for change, the constitution has provided a method of amendment. In his farewell address, George Washington commended this method to the American people, and warned against change by other methods. He said:

"If in the opinion of the people the distribution or modification of the constitutional powers be in any particular wrong, let it be corrected by an amendment in the way which the constitution designates. But let there be no change by usurpation; for though this in one instance may be the instrument of good, it is the customary weapon by which free governments are destroyed. The precedent must always greatly overbalance in permanent evil any partial or transient benefit which the use can at any time yield."

The present President, disregarding this admonition of our first president, says that there is no time for amendment and that we must obtain change by packing the court *"now."* This is precisely the thing against which Washington warned. Our present Executive indicates no emergency which requires such action; and overlooks the fact that haste has been the primary defect in New Deal legislation. Haste in action causes more loss of time in this world than all the idling of which humans may be guilty. Let us avoid haste in breaking down the fundamentals of our government, for in such a case we will, as Washington indicates, act in haste and repent at leisure. But repentance will come too late.

A REPLY

Handicaps under Which the Writer Suffers in Preparing Article for the Journal in Support of President's Plan—Careful Consideration of the Contributions of Eight Distinguished and Alarmed Leaders of the Bar in the April Issue—President Stinchfield's Faith in the Essential Malevolence of Congress—Mr. Olney's Criticism of Attacks on the Court's Decisions and Certain Pertinent Observations by Justices McReynolds and Stone and Chief Justice Hughes—Mr. Lecher and the Potato Act—Mr. Pepper's Gloomy Article—Other Contributions Thoughtfully Appraised—The Six Proposed Additional Justices and the Discovery of Quinine—Some Dogmatic Assertions.

By Thurman W. Arnold

Professor of Law at Yale University; Special Assistant to the Attorney General.

IT is with some reluctance that the writer responds to a request from a member of the Journal's Board for an article supporting the President's Supreme Court proposal. In the first place, I argue in a hostile forum, with the satisfaction which comes from making a convert virtually denied me in advance. Secondly, in the articles appearing in the last issue of the Journal the President's proposal is so smothered in symbolism and garnished with poetry that it is difficult to reply in an orderly and logical fashion. Thirdly, I reply to writers who, for the most part, shy at realism, where the Supreme Court is concerned. Such generally recognized premises as that the Constitution is what the judges say it is, that the Court controls far-reaching matters of social and economic policy, that judges in their decisions are not above criticism seem not to be recognized by those to whom such premises should be undeniable. Thus to argue adequately I must prove propositions of which even the layman takes judicial notice. The burden is too great—the time is too short.

Oddly enough, I find myself, an academician, pleading with practical men to be realists. The set-up is wrong.

Fourthly and finally, a reading of the last issue of the Journal has spoiled my disposition. Ordinarily a seriously-minded person, I find myself sorely tempted to be otherwise. This is another handicap which confronts me at the start. I will illustrate this handicap by reviewing the dangers which the spokesmen for the majority view of the American Bar Association appear to see in the President's proposal.

In the April issue of this Journal eight distinguished and alarmed leaders of the Bar and one editor have made it abundantly clear that the proposal is fundamentally immoral. That being so, it follows that the wages of sin are death. Grave peril of a somewhat unspecific character lies in wait for us. The nation is about to lose its immortal soul and become at best a bureaucracy, and at worst a tyranny. The whole issue is keyed to a note of warning of impending doom.

For example, President Stinchfield, who contributes the first article, tells us that if we adopt the plan "We shall have government from Washington covering a territory of 130 million people." The superficial observer might think that this was one of the objectives for which the Civil War was fought and therefore had its good points. But President Stinchfield goes on to say: "We must inevitably become a government by bureaucracy. . ." Such mysterious matters, of course, cannot be proved, but President Stinchfield's faith in the essential malevolence of Congress is such that he doesn't think they need any proof. He says: "I think we are in great danger at the moment."

Mr. Olney, who followed Mr. Stinchfield, is also gloomy and sad about the remote future, through whose mists his prophetic vision penetrates without any difficulty. He is particularly worried because he is afraid that labor unions will disappear if the President's proposal is passed. He says that the measure may put them "at the mercy of a President and Congress who choose to pass a law forbidding the persuasion of men to join a union. . ." This seems a very odd thing to worry about just now. However, Mr. Olney shows us how foolish it is for labor to be cheerful about its future right to organize. He says:

> "It is no answer to this to say that such a thing could not happen in this country. It has happened elsewhere in countries no less civilized than ours. It has happened in Germany and Italy."

Elsewhere in the article Mr. Olney points out that Germany and Italy are not the only countries which we may become like. We may also become like the South American republics, of whose judiciary Mr. Olney seems to have a low opinion. The trouble with Germany, Italy and the South American republics is that in their blindness they bowed down to the wrong principles, like the heathen. For example the German people, having a choice between the right principles and the wrong ones, chose the wrong ones. Persecution of the Jews and a subservient judiciary automatically fol-

lowed (as everyone knew they would). This, Mr. Olney thinks, is tough on Germany, but it is a lucky break for us, because now labor and the underprivileged groups can see the dangers of getting what they want.

The writer is attracted to Mr. Olney's analysis of the complex conditions in Europe and South America because he makes it so simple and easy to understand and shows just why we are on the verge of becoming like these countries. He does not tell us, however, whether, if the President's plan is adopted, we will become like Germany, Italy and/or the South American republics separately and in succession or whether we will resemble all of them at the same time.

Another thing appears to annoy Mr. Olney. There are many people, he says, who claim that the Court has been vetoing laws by decisions which are unwarranted by the language of the Constitution itself. He thinks that it is very wrong to make such a claim. He says:

". . . how can the Court, in performing its judicial duty in deciding the case do otherwise than decide it in accord with the Constitution and refuse to give the effect to the law in conflict with it and hold such law invalid? *And this, and only this, is all that the Supreme Court has ever done.*"

The truth of the last sentence, we think, is beautifully illustrated by the following remarks of Mr. Justice McReynolds from the Bench in the gold clause case:

"Nero undertook to exercise that power. Six centuries ago in France it was regarded as a prerogative of the sovereign. . . . It seems impossible to overestimate what has been done here today. The Constitution is gone. . . . The people's fundamental rights have been preempted by Congress. Some day the truth will be seen."

But, in spite of all this, some people persist in claiming that the Court has been declaring laws invalid in a completely unwarranted way. This unfortunate tendency is one of the dangers against which Mr. Olney is warning us in this article. It would not be so bad if such remarks were confined to irresponsible people, but it is dangerous to find them in the highest places. For instance, Mr. Justice Stone, in the A.A.A. case, clearly intimated that the Court had usurped power in the exercise of which they could only be limited by their own economic predilections. And Mr. Chief Justice Hughes was even more outspoken and specific in what the Court was doing in the railway pension case when he said:

"I think the conclusion reached is a departure from sound principles and places an unwarranted limitation upon the commerce clause of the Constitution."

Such attacks on the Court, Mr. Olney says, are "untrue" and the consequences of their being broadcast in public are "mischievous." (In fairness to Mr. Olney, however, it should be said that the general impression one gets from his article is that he is not condemning Mr. Chief Justice Hughes and Mr. Justice Stone, but only those who have the bad taste to repeat the language of these dissenting opinions in public.)

These unfortunate and untrue remarks about the Court not following the Constitution at all times are, however, not the main point of Mr. Olney's article. He points out:

"But untrue as are the attacks upon the Supreme Court and mischievous as are the consequences of their being broadcast to the American people, the danger to the nation by reason of them is not to be compared with the danger inherent in the proposal to add presently six more members to that court."

At this point Mr. Olney analyzes the struggle for human liberty. He has some very unkind things to say about the old court of the Star Chamber and he leaves little doubt in the reader's mind that he disapproves of the way that court carried on. On the other hand, he is enthusiastic about the language of the Declaration of Independence, particularly where it refers to "life, liberty and the pursuit of happiness." He is quite convinced that the President's proposal not only destroys the Supreme Court but also the Declaration of Independence.

The next article is by Louis A. Lecher, a distinguished member of the Milwaukee Bar. It is evident that he has been thinking along the same lines as Mr. Olney. However, he is more specific. The Potato Act was, he thinks, not only an unwise agricultural measure; it was also a subtly concealed attack on human liberty. I gather from the following quotation that Mr. Lecher thinks that any quota of agricultural products, such as the Jones-Costigan Sugar Act, or even the tariff Act, is a threat to human liberty, particularly on Sunday. He asks: "Does the President believe that a regulation which provides that the serving of potatoes to *guests* at a Sunday dinner shall constitute a criminal offense if not done 'according to statute and regulations issued pursuant thereto' does not deprive our people of their liberties?"

Mr. Lecher points out another specific danger which no one else has thought of. "What," he asks, "would happen to State rights, for example, if the President were to appoint the Hon. John Dickinson. . ." I confess that this is a real body blow because Mr. Dickinson's present position as general solicitor for the Pennsylvania Railroad is such an effective disguise for his "dangerous" ideas.

The next article is by George Wharton Pepper. Mr. Pepper is convinced that the enlargement of the Court in effect amounts to the unconstitutional removal of the existing justices, even though they are expressly permitted to remain by the act itself. This is an interesting idea, but the writer confesses that he does not understand it very well.

The rest of Mr. Pepper's discussion, however, is quite clear because it deals with the broader issues of freedom and respect for government on which all sound lawyers agree. He says:

"Here the question is not whether A or B shall be

elected to political office but whether A and B shall be deprived of their guaranties of civil and religious liberty."

He sees in the plan danger to labor and the Jews and the Catholics and the schools and points out that professors like the writer are foes to education within its own household, because they do not realize that the defeat of the plan is essential to academic freedom. He observes that "Unless labor leaders, Jews, Catholics, educators and editors come to their senses before it is too late they will find themselves in an America which is anything but a land of the free."

Mr. Pepper's article is particularly gloomy because he shows that so far as this generation is concerned the harm has already been done. When Mr. Roosevelt agreed with the dissenting justices that the A.A.A. was not forbidden by the Constitution but was therefore destroyed by judicial veto, Mr. Pepper says "he did more harm in ten seconds than patriots can repair in a generation." It was Mr. Wallace, however, who drove the last nail in the coffin according to Mr. Pepper, who says: "When his Secretary of Agriculture publicly criticized the A.A.A. decision as a 'legalized steal' he was subordinating the good of his country to an emotional satisfaction. Such intemperate expressions by men in high place give great encouragement to the lawless element in the country. . ."

There is an interesting paradox here which is difficult to explain to the layman and which even the writer does not understand very well. That paradox is the fact that it is perfectly proper for justices of the Supreme Court of the United States to write dissenting opinions but highly dangerous and subversive to repeat the sentiments containing these opinions in public.

Mr. Pepper's fourth and concluding point is as follows:

"But the most dangerous of all the consequences of the President's proposal is the inevitable impairment of respect for government."

This argument has a certain familiarity. The writer recalls that in 1928, the closing days of prohibition, a poll was taken by a national economic organization of prominent lawyers and economists. They were asked to point out what they considered the greatest danger facing America. An overwhelming majority said that it was lack of respect for law. The depression which followed indicated that the lack of respect for law engendered by the prohibtion amendment was actually not such a real danger as something else which the distinguished lawyers and economists overlooked at the time; to wit, maldistribution of purchasing power throughout the country. However, "lack of respect" is the kind of argument the older generation always uses against the younger and therefore it is not surprising to see it bobbing up again in the debate on the President's proposal.

The next big gun to go off is Mr. George Bogert. Mr. George Bogert is a legal scholar like the writer and not a practicing lawyer. This makes him a little more cautious in his predictions of disaster because legal scholars are not closely in touch with the world of affairs and therefore more academic and less practical. However, Mr. Bogert is convinced on the main issue, and that is that "he is forced to see in the new plan something subtly immoral and dishonest. . . " Mr. Bogert is, of course, not the kind of man who is willing to justify immorality of any kind and therefore he is against the plan.

Mr. Donovan then speaks. He analyzes the groups that are in imminent danger from the plan. They are religious groups, racial groups, citizens of foreign descent, labor unions and persons charged with crime. All of these people would, in Mr. Donovan's opinion, be in a bad way if more justices were added to the Court under the plan.

Then comes Dean Smith of Columbia University. He admits that the Supreme Court has "read into the Constitution limitations upon the powers of government not required by its language." He thinks this is a bad thing. However, he believes that when the Supreme Court goes wrong thirteen states scattered indiscriminately all over the country should be permitted to perpetuate that error forever by having the power to block an amendment. Of course, as a scholar he knows that the President's plan is constitutional. However, he thinks that it is a very weak point in the Constitution and that the constitutional fathers were very wrong in giving to Congress this power to avoid an impasse between the Court and the legislature. He proves this by quoting Mr. James Bryce, an Englishman, who saw this mistake which the fathers had made and called it "a weak point." Dean Smith now insists that the time has come to create a sort of sentimental amendment to the Constitution to correct this original blunder of the fathers pointed out by James Bryce. He does not think that this sentimental amendment should be submitted to the people because it is too hard for them to understand. His theory is as follows. Congress should not attempt to exercise a constitutional power over the Court unless it is not only a power that has been given to Congress but also a power that ought to have been given to Congress. In other words, Congress ought not to exercise any constitutional powers which were given but which *ought not to have been given,* even though in doing so they correct constitutional interpretations which the Court ought not to have made. This point is a very scholarly one and requires a good deal of study. If you read it over and over again several times, it becomes more clear than on the first reading. He is against the plan on scholarly grounds, and for Mr. Roosevelt's general objectives on economic grounds. He is too good a legal scholar to allow his economic ideas to get mixed up with his legal ones.

Honorable Frank E. Atwood of the Jefferson City Bar fires the last shot in the barrage. Judge Atwood takes a new position. He says: "If nothing more than 'constant infusion of new blood in courts' were intended, the reason assigned would hardly be chal-

lenged." By this he means that if the Supreme Court were not giving Congress any trouble, the plan would be all right. It is the use of the President's plan to avoid an impasse between the legislature and the Court which Judge Atwood thinks is bad. His position is a little like Dean Smith's, except that he thinks that the power of Congress over the personnel of the Court is perfectly all right to exercise when there is no particular occasion for it. He is very much worried about something which he calls "absolute collectivism," which he says has already destroyed the democracies of continental Europe. He closes with a familiar quotation from the well-known poet Naevius.

On finishing Judge Atwood's article, the writer, who had been on the receiving end of this barrage, thought that the firing had ended. However, he soon found that he was mistaken. The editors of the Journal did not consider that these eight heavy legal howitzers were quite sufficient to blow the plan completely out of water, so to make things absolutely sure they dropped an editorial bomb on it of more than usual weight and length.

I am glad, however, that this editorial bomb was dropped because it makes some things clear which had confused me from reading the articles themselves. For instance, Mr. Pepper had said that the plan was really one for the removal of the judges in spite of the fact that the proposed statute not only let the judges stay but preserved their right to vote and to deliver opinions and Mr. Lecher intimated that the plan might be unconstitutional because it "constitutes an unconstitutional attempt to delegate legislative authority to the very six justices who are accused by the President of usurping legislative powers." Both of these ideas, and particularly the last, are very complicated, like the fourth dimension, and a little difficult to grasp. I thought at first that Mr. Lecher meant that the decision on the Wagner Labor Act was unconstitutional because since the act itself was unconstitutional a decision declaring it constitutional would certainly be unconstitutional. However, the editorial clears the difficulty up very nicely by pointing out that if the new fifteen judge Court should declare the President's proposal constitutional because it followed the letter of the Constitution it would be an unconstitutional decision. The editorial puts it in this way:

"If the proposed act violates the spirit of the Constitution and threatens the breakdown of an essential part of it, 'constitutional morality' certainly forbids it. To act under such circumstances is simply to exercise a brute power. And the spirit is more important than the letter. As long as the spirit of the Constitution is followed, there will be small trouble about the letter, and the great instrument and guarantee of our liberties is safe. But when the letter is followed in disregard of the spirit, catastrophe may be near."

The more the writer considers this new doctrine of "constitutional morality," the more he wishes he had thought of it himself. The beauty of this kind of argument is that it makes the Constitution very elastic indeed, so that it can be used on both sides of any moral question without the user being bothered with what the Constitution actually says. However, I do not think it is fair for me to use on my side an argument which was thought up by the opposite side, so I will not do it.

The editorial closes on a high poetic note as follows:

"'It was not made with the mountains, it is not one with the deep;
Men, not gods, devised it; Men, not gods, must keep.'"

I have read this over several times and am still not quite sure whether it means that more men should be added to the Supreme Court or not. In any event, it is certainly a very lovely thought, beautifully expressed and quite in keeping with the general atmosphere of the entire issue of the Journal.

I hope that the reader will understand from this brief review of the April issue of the Journal why I was reluctant to introduce a note of doubt or lack of faith in such a revival meeting. I do not wish, however, to end my review of that issue on a critical note. Organizations like the American Bar Association are necessarily as dependent on slogans, symbols and ceremony as colleges, or churches, or Rotary clubs. The Supreme Court of the United States has always occupied the central place on the high altar of the American Bar. It is obviously as impossible to expect them to be objective and realistic about it as for communists to be realistic about Karl Marx. The only point I am making is that such an atmosphere makes calm discussion very difficult.

Since the entire opposition is keyed on a note of fundamental moral principle, one cannot hope to carry conviction to those who believe that the President's plan is some sort of social sin. The reasons for urging the plan are practical. The reasons for opposing it are mystical. In such a situation all I can do is to make the following dogmatic assertions which show why I believe the plan is not only a common sense measure but also a conservative method of solving an acute problem.

In the first place, I assert that there is absolutely no danger in this country of a repetition of the experiences in Germany, Italy, Russia, Spain or South America. It is difficult for me to conceive how anyone can really be afraid of such conditions at the beginning of an economic recovery. These conditions are the products of the psychology of misery and defeat. We are emerging into an atmosphere of hope and confidence.

In the second place, I assert that anyone who predicts what will happen in future generations is talking absolute nonsense. The constitutional fathers did not foresee the Civil War. If they had foreseen it, they could have done nothing to prevent it. At the close of the Civil War men could not have predicted the automobile or any of the tremendous changes which are taking place in this country. In 1928 no one had any idea of the extent and magnitude of the depression which

was to follow. The posterity argument does not deserve a place in a rational discussion of this problem.

In the third place, I assert that the present Supreme Court of the United States does not present the spectacle of an impartial judicial tribunal operating in an atmosphere of judicial calm. It has lost the confidence of large sections of the American public because it represents two mutually irreconcilable groups which swing back and forth according to the opinion of one or two men. The very fact that constitutional law is now being referred to as "Roberts' land" indicates the complete lack of faith in the existence of constitutional doctrine as opposed to personal predilections. To take a conspicuous example, I do not see how anyone can deny that constitutional law today is in complete confusion with the Guffey Coal Act decision and the Wagner Labor Act decisions, both standing as the law of the land.

In the fourth place, I assert that the Court presents the spectacle of two bitter irreconcilable groups who are attacking each other from the Bench, even in as simple a situation as was presented by the Herndon case, where no social or economic policies but only civil liberty was involved. Herndon was kept in jail by a six-to-three decision. He was liberated by a five-to-four decision. He has served years under an indictment against which the Constitution is supposed to protect him. The Court cannot be a battle ground between irreconcilable men and preserve its prestige as a judicial body.

In the fifth place, I assert that when a court which is supposed to represent the ideal of rule of law and the symbol of national unity becomes a bitter battle ground between opposing political theories, the only remedy is to appoint men on the court who are sufficiently aware of the function the court must play among American ideals to exercise adequate judicial statesmanship. No institution torn by such internal dissension can assume the kind of leadership which the Supreme Court of the United States owes to the American people.

More points could, of course, be added and the dogmatism of these assertions could, I think, be removed by more extensive treatment. I see, however, no point in this type of argument here. The real struggle is between practical common sense and moral mysticism. In such a struggle preaching is more effective than detailed facts; analogy is more effective than analysis.

Centuries ago people looked at the human body as they look upon social institutions today. Each organ had its divine function and anyone who intimated that the human constitution was not the best constitution that could have been devised was excommunicated for heresy. In such a climate of opinion the Jesuits discovered a remedy for fever called Peruvian bark, since it was found in Peru. It is now called quinine.

Up to that time the remedy for fever had been bleeding the patient. It was an excellent remedy because it was at the same time so logical and so disagreeable. It was logical because fever was supposed to be a humour which had gotten into the blood. Obviously, it had to be drained out before the patient stood any chance of recovery. More people died of bleeding than of fever. But it was all in a good cause, for were they not getting rid of humours? (I should explain that this was unconscious humour. It was not a deliberate practical joke on the patient, any more than preventing the passage of constitutional minimum wage laws for fourteen years was a deliberate practical joke.)

The fact that this cure for fever was disagreeable added to the faith men had in it. In medicine then, as in government today, there was great confidence in curative methods which made people suffer, because suffering itself was supposed to be good for people. It gave them character. As the Supreme Court has frequently intimated, we only realize that we have got a Constitution when it pinches and therefore great care should be taken not to so construe it that it does not pinch because otherwise we might forget all about it.

Now, of course, argued the wise men of the middle ages, a time-honored remedy like bleeding should not lightly be thrown aside in favor of one which simply made the patient feel better. There were also people who disliked the Jesuits who pointed out that grave danger that if Jesuitical remedies were used the world might be plunged into Jesuitism—just as today nervous people thunder that if national power is used to solve national problems America will become like Germany, or Italy, or we will grow beards and start drinking vodka like the Russians. Then there was a third group who were learned in the great fundamental principles of medicine, handed down by the constitutional doctors of the human constitution. These men proved by exhaustive briefs and research into the medical opinions of the past that Galen, in spite of the fact that he had never heard of quinine, would have been opposed to it on principle and that he was probably turning over in his grave whenever it was mentioned. These learned men also pointed out that quinine was a mere temporary palliative which caused only an artificial recovery. The patient might feel better at the time, but he would really be worse and die later because he had violated the fundamental principles of medicine and left the noxious humours still in the blood. This was easy to prove because they always did die later. What advantage this temporary relief, these great authorities said, if in using it we undermine the sacred and fundamental principles of medicine, destroy our respect for medical authority, turn the world over to the Jesuits, leaving the noxious humours still in the blood. Medical principles are not things which change from day to day.

And so the University of Paris, which occupied in the eyes of learned and conservative people almost the same place that the Supreme Court of the United States does today, banned the use of quinine as a remedy by any physician under its jurisdiction.

Now, the odd thing about this historical incident

(*Continued on page* 393)

REVIEW OF RECENT SUPREME COURT DECISIONS

Duty of Railway Employers to Treat with Representatives of Employees under Amended Railway Labor Act—Enforceable by Equitable Decree—New Frazier-Lemke Act Upheld as Valid Exercise of Bankruptcy Power—Adkins vs. Children's Hospital Overruled and Washington Statute Providing for Fixing Minimum Wages for Women Upheld—National Labor Relations Act Held a Valid Exercise by Congress of Its Power under Commerce Clause for Purpose of Preventing Strikes and Labor Disturbances Affecting Interstate Commerce—In Associated Press Case Court Points out That Order of Board Was Based on Discharge of Employee for Union Activity and Does Not Interfere with Liberty of Press to Enforce Its Policies or to Discharge Employees Who Fail to Comply—Strong Dissent

By Edgar Bronson Tolman*

Railway Labor Act—Validity as Applied to Back Shop Employees

Under the Railway Labor Act, as amended, a railroad company subject thereto is required to treat with the duly accredited representatives of employees for the purpose of negotiating collective agreements respecting rates of pay, rules and working conditions, and for the settlement of disputes between employer and employees. The duty to treat with such representatives of the employees is a proper subject for enforcement by equitable decree.

"Back shop" employees have such a necessary relation to the interstate operations of the railroad that the act is valid as to them.

The Virginian Railway Company v. System Federation No. 40, etc., et al., 81 Adv.Op. 470; 57 Sup. Ct. Rep. 592.

In this case the Court passed on the constitutional validity of provisions of the Railway Labor Act of 1926, as amended in 1934, and as to the nature and extent of relief authorized by the Act.

Respondents include System Federation No. 40, referred to as the Federation, which is a labor organization affiliated with the American Federation of Labor, and represents shop craft employees of the petitioner Railway Company, and includes certain individuals who are officers and members of the Federation. They sued in the Federal Court for Eastern Virginia to compel the Railway to recognize and treat with the Federation as the duly accredited representative of the mechanical department employees of the Railway and to restrain the Railway from interfering with, influencing or coercing its shop craft employees in freely choosing representatives for the purpose of contracting with the Railway with respect to rules, rates of pay and working conditions, and for settling labor disputes. The District Court granted the relief sought and the Circuit Court of Appeals affirmed its decree. On certiorari the decree was unanimously affirmed by the Supreme Court in an opinion by Mr. Justice Stone.

The history of the controversy extends back to 1922 when, upon failure of a strike of the shop employees affiliated with the American Federation of Labor, other employees organized a local union known as the "Mechanical Department Association of the Virginian Railway." This association, a so-called "company union," made an agreement with the Railway as to rates of pay and working conditions and for the settlement of disputes, and maintained an organization. In 1927 the American Federation of Labor formed a local organization which, in 1934, demanded recognition by the Railway of its authority to represent the shop craft employees and invoked the aid of the National Mediation Board to establish its authority. The Board held an election in conformity with the statute and as the result thereof certified that the Federation was the duly accredited representative of employees in the six shop crafts.

The trial court found that the Federation was the duly authorized representative of the Mechanical Department employees except carmen and coach cleaners; that petitioner, in violation of Section 2 of the Railway Labor Act, had failed to treat with the Federation as such representative and had sought to influence the employees against affiliation with any organization other than the association which it maintained; had sought to prevent the employees from choosing their own representative; and had organized the Independent Shop Craft Association, and had tried to induce the employees to join it and make it their representative.

On these findings the court directed the Railway to "treat with" the Federation and to endeavor to reach an agreement with it as to rates of pay, rules and conditions and the settlement of disputes, and restrained the Railway from entering into any contract as to these matters, except through the Federation, and from interfering with the employees with respect to their choice of representatives. The decree also restrained the Railway from fostering any union for the purpose of interfering with the Federation as the accredited representative.

In the Supreme Court the Railway contended that the Railway Labor Act, Section 2, Ninth, imposes no legally enforcible obligation upon the carrier to negotiate with the accredited representative and that in any case it imposes no obligation which can be appropriately enforced by a court of equity. It contended also that that provision violates the commerce and due process clauses.

The Supreme Court accepted the findings of the District Court, proceeded to a consideration of the

*Assisted by James L. Homire.

Note: Lack of space prevents the publication in this issue of the "Summary of Other Business of the Court." This summary will be brought up to date and printed in the next issue.

questions of law, and reviewed the history of the legislation beginning with the Transportation Act of 1920. That Act set up the Railroad Labor Board as a means for peaceful settlement of disputes, but its decisions were not supported by legal sanctions. In 1926 the policy of Congress was extended by adding legal obligations for the enforcement of arbitration awards made in labor disputes and recognized the right of the employees to designate representatives for purposes of the Act "without interference, influence or coercion exercised by either party over the self-organization or designation of representatives by the other." Prohibition against such interference was made explicit by an amendment in 1934.

The Railway did not question the decree to the extent that it enjoins interference with the free choice of representatives by employees and the fostering of the company union. It did contend that the statute affords no legal sanction for that part of the decree which directs the Railway to "treat with" the Federation and to exert every reasonable effort to make and maintain agreements with the employees. Rejecting this contention MR. JUSTICE STONE said:

"Petitioner argues that the phrase 'treat with' must be taken as the equivalent of 'treat' in its intransitive sense, as meaning 'regard' or 'act towards,' so that compliance with its mandate requires the employer to meet the authorized representative of the employees only if and when he shall elect to negotiate with them. This suggestion disregards the words of the section, and ignores the plain purpose made manifest throughout the numerous provisions of the Act. Its major objective is the avoidance of industrial strife, by conference between the authorized representatives of employer and employe. The command to the employer to 'treat with' the authorized representative of the employees adds nothing to the 1926 Act, unless it requires some affirmative act on the part of the employer. . . . As we cannot assume that its addition to the statute was purposeless, we must take its meaning to be that which the words suggest, which alone would add something to the statute as it was before amendment, and which alone would tend to effect the purpose of the legislation. The statute does not undertake to compel agreement between the employer and employees, but it does command those preliminary steps without which no agreement can be reached. It at least requires the employer to meet and confer with the authorized representative of its employees, to listen to their complaints, to make reasonable effort to compose differences—in short, to enter into a negotiation for the settlement of labor disputes such as is contemplated by §2, First."

The Court observed that, upon the proper construction of the decree, the Railway Company is not enjoined from making agreements with individual employees and that the restraint from dealing with other representatives applies only to collective agreement. As to this the opinion states:

It imposes the affirmative duty to treat only with the true representative, and hence the negative duty to treat with no other. We think, as the Government concedes in its brief, that the injunction against petitioner's entering into any contract concerning rules, rates of pay and working conditions, except with respondent, is designed only to prevent collective bargaining with anyone purporting to represent employees, other than respondent, who has been ascertained to be their true representative. When read in its context it must be taken to prohibit the negotiation of labor contracts, generally applicable to employees in the mechanical department, with any representative other than respondent, but not as precluding such individual contracts as petitioner may elect to make directly with individual employees. The decree, thus construed, conforms, in both its affirmative and negative aspects, to the requirements of §2."

In dealing with the contention that the obligation to negotiate is not the appropriate subject of equitable relief, the opinion briefly reviews the general principles applicable to the granting of such relief. The policy of Congress and the public interest involved in the peaceful settlement of labor controversies were cited as supporting the view that equitable relief is appropriate here. As to this MR. JUSTICE STONE said:

"In considering the propriety of the equitable relief granted here, we cannot ignore the judgment of Congress, deliberately expressed in legislation, that where the obstruction of the company union is removed, the meeting of employers and employees at the conference table is a powerful aid to industrial peace. Moreover, the resources of the Railway Labor Act are not exhausted if negotiation fails in the first instance to result in agreement. If disputes concerning changes in rates of pay, rules or working conditions, are 'not adjusted by the parties in conference,' either party may invoke the mediation services of the Mediation Board, §5, First, or the parties may agree to seek the benefits of the arbitration provision of §7. With the coercive influence of the company union ended, and in view of the interest of both parties in avoiding a strike, we cannot assume that negotiation, as required by the decree, will not result in agreement, or lead to successful mediation or arbitration, or that the attempt to secure one or another through the relief which the district court gave is not worth the effort.

"More is involved than the settlement of a private controversy without appreciable consequences to the public. The peaceable settlement of labor controversies, especially where they may seriously impair the ability of an interstate rail carrier to perform its service to the public, is a matter of public concern. That is testified to by the history of the legislation now before us, the reports of committees of Congress having the proposed legislation in charge, and by our common knowledge. Courts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved."

Attention was then given to the question raised as to the constitutional validity of Section 2. In this connection the declared purposes of the Act to avoid interruption of commerce and to provide for the prompt and orderly settlement of labor disputes and the recognized power of Congress to achieve these purposes were cited. The petitioner contended, however, that the Act as applied to its "back shop" employees is not within the commerce power because the duties of such employees have no direct relation to interstate commerce. But the Court rejected this argument and said:

"The activities in which these employees are engaged have such a relation to the other confessedly interstate activities of the petitioner that they are to be regarded as a part of them. All taken together fall within the power of Congress over interstate commerce. . . . Both courts below have found that interruption by strikes of the back shop employees, if more than temporary, would seriously cripple petitioner's interstate transportation. The relation of the back shop to transportation is such that a strike of petitioner's employees there, quite apart from the likelihood of its spreading to the operating department, would subject petitioner to the danger, substantial, though possibly indefinable in its extent, of interruption of the transportation service. The cause is not remote from the effect. The relation between them is not tenuous. The effect on commerce cannot be regarded as negligible."

The Railway contended also that Section 2 of the Railway Labor Act, as applied, violates the Fifth Amendment. But the Court concluded otherwise and pointed out that the provisions of the Act do not require

the Railway to enter into any agreement with its employees and do not prohibit it from making contracts of employment with its individual employees. It was also observed that the prohibition of a company union was sustained in the *Railway Clerks'* case, 281 U. S. 548, and that the only affirmative duty imposed is that of "treating with" the authorized representatives of the employees for the purpose of negotiating a labor dispute.

A further point raised for consideration was whether a majority of all eligible to vote is requisite for the election of representatives, or whether merely a majority of those voting is sufficient, assuming a majority of those eligible actually participate in the election. The Court concluded that there was no reason for a departure from the general rule that a majority of those participating is sufficient.

In conclusion the Court considered and rejected the contention that the decree failed to conform to certain requirements of the Norris-LaGuardia Act.

The case was argued by Messrs. James Piper and H. T. Hall for the Railway Company, and by Mr. Frank L. Mulholland for the respondents. Solicitor General Reed argued the case for the United States as amicus curiae, by special leave of Court.

Bankruptcy—Validity of Amended Frazier-Lemke Act

Section 75, subsection (s) of the Bankruptcy Act, as amended by new Frazier-Lemke Act of 1935, is a valid exercise of the bankruptcy power, and constitutes no violation of the due process clause of the Fifth Amendment.

Wright vs. Vinton Branch of the Mountain Trust Bank of Roanoke, Va., et al., 81 Adv. Op. 487; 57 Sup. Ct. Rep. 556.

In this case the validity of bankruptcy legislation for the relief of farmers was again before the Court. On this occasion the Court unanimously upheld the validity of the new Frazier-Lemke Act with MR. JUSTICE BRANDEIS delivering the opinion of the Court. It will be recalled that MR. JUSTICE BRANDEIS also delivered the Court's opinion on the old Frazier-Lemke Act which was unanimously held unconstitutional by the Court.

In the present case the petitioner, a farmer, in 1929 gave a mortgage deed of trust on his farm to secure a debt to the respondent bank. In March, 1935, he filed a petition under the bankruptcy act as amended by the Frazier-Lemke Act, and in October, 1935, he filed an amended petition under the new Frazier-Lemke Act asking to be adjudged a bankrupt and to have all the benefits of the provisions of subsection (s) of Section 75 as so amended and approved in August, 1935.

An order was entered adjudging Wright a bankrupt and referring the matter to the Conciliation Commissioner. The bank then moved for dismissal of the proceedings on the ground that subsection (s) of the Act is unconstitutional, in that it deprives the creditor of property without due process of law. This motion was granted, all proceedings on the bankruptcy petition were terminated and the petition was dismissed. The Circuit Court of Appeals affirmed the order under the authority of the *Radford* case, 295 U. S. 555, which had declared the first Frazier-Lemke Act unconstitutional.

In considering the question presented MR. JUSTICE BRANDEIS first called attention to the fact that the bank claims the legislation is void on its face. This contention was rejected, and it was observed that the *Radford* case did not question the power of Congress to enact legislation under the bankruptcy power in aid of the rehabilitation of distressed farmers. Explaining the essence of the decision in the *Radford* case, and emphasizing the legislative efforts to remedy the defects of the earlier act, MR. JUSTICE BRANDEIS said:

> The original Frazier-Lemke Act was there held invalid solely on the ground that the bankruptcy power of Congress, like its other great powers, is subject to the Fifth Amendment; and that, as applied to mortgages given before its enactment, the statute violated that Amendment, since it effected a substantial impairment of the mortgagee's security. The opinion enumerates five important substantive rights in specific property which had been taken. It was not held that the deprivation of any one of these rights would have rendered the Act invalid, but that the effect of the statute in its entirety was to deprive the mortgagee of his property without due process of law. The rights enumerated were (pp. 594, 595):
>
> "'1. The right to retain the lien until the indebtedness thereby secured is paid.
>
> "'2. The right to realize upon the security by a judicial public sale.
>
> "'3. The right to determine when such sale shall be held, subject only to the discretion of the court.
>
> "'4. The right to protect its interest in the property by bidding at such sale whenever held, and thus to assure having the mortgaged property devoted primarily to the satisfaction of the debt, either through receipt of the proceeds of a fair competitive sale or by taking the property itself.
>
> "'5. The right to control meanwhile the property during the period of default, subject only to discretion of the court, and to have the rents and profits collected by a receiver for the satisfaction of the debt.'
>
> "In drafting the new Frazier-Lemke Act, its framers sought to preserve to the mortgagee all of these rights so far as essential to the enjoyment of his security. The measure received careful consideration before the committees of the House and the Senate. Amendments were made there with a view to ensuring the constitutionality of the legislation recommended. The Congress concluded, after full discussion, that the bill, as enacted, was free from the objectionable features which had been held fatal to the original Act."

It was then noted that there was no denial that the new act adequately preserves three of the five enumerated rights of a mortgagee, namely, the first, second and fourth. The claim of unconstitutionality, however, was rested mainly on the contention that the new act denies to the mortgagee the third of the enumerated rights, namely, the "right to determine when such sale shall be held, subject only to the discretion of the court." The respondent contended that the new law, in effect, gives the mortgagor the *absolute* right to a three-year stay, and that such a three-year moratorium cannot be justified. This contention was rejected, however, as inconsistent with the proper construction of the Act, so that the Court found it unnecessary to decide whether an absolute three-year stay would be permissible under the bankruptcy power in the circumstances. A considerable portion of the opinion was devoted to a discussion of the intent of the Act. As to the proper construction of the Act, the opinion states, in part:

> "Whether, in view of the emergency, an absolute stay of three years would have been justified under the bankruptcy power, we have no occasion to decide. There are other provisions in the statute affecting the mortgagor's right to possession. Their phraseology is lacking in clarity. But we are of opinion that, while the Act affords the debtor, ordinarily, a three-year period of rehabilitation, the stay provided for is not an absolute one; and that the court may terminate the stay and order a sale earlier.

If we were in doubt as to the intention of Congress, we should still be led to that construction by a well settled rule: 'When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.'

* * *

"Since the language of the Act is not free from doubt in the particulars mentioned, we are justified in seeking enlightenment from reports of Congressional committees and explanations given on the floor of the Senate and House by those in charge of the measure. When the legislative history of the bill is thus surveyed, it becomes clear that to construe the Act otherwise than as giving the courts broad power to curtail the stay for the protection of the mortgagee would be inconsistent not only with provisions of the Act, but with the committee reports and with the exposition of the bill made in both Houses by its authors and those in charge of the bill and accepted by the Congress without dissent. We construe it as giving the courts such power."

Attention was given also to the bank's contention that the Act is invalid because it takes from the mortgagee "the right to control meanwhile the property during the period of default, subject only to the discretion of the court, and to have the rents and profits collected by a receiver for the satisfaction of the debt." In support of this point it was argued by the bank that possession by the mortgagor during the stay is necessarily less favorable to the mortgagee than possession by a receiver or trustee would be. This argument was thought unsound by the Court, which pointed to the self-interest of the mortgagor to stimulate the most profitable use of the property. With respect to this feature, MR. JUSTICE BRANDEIS said:

"The mortgagor is in default, but it is not therefore to be assumed that he is a wrongdoer, or incompetent to conduct farming operations. The legislation is designed to aid victims of the general economic depression. The mortgagor is familiar with the property, and presumably vitally interested in preserving ownership thereof and ready to exert himself to the uttermost to that end. It is not unreasonable to assume that, under these circumstances, the interests of all concerned will be better served by leaving him in possession than by installing a disinterested receiver or trustee. For the mortgagor holds possession charged with obligations imposed for the benefit of the mortgagee as fully as if the property were in the possession of a receiver or trustee, and there is probably a saving of expense. In order to protect the creditor's interests, the possession is at all times subject to the supervision and control of the court; and, if the debtor, 'at any time,' fails to comply with orders of the court issued in the exercise of its supervisory power to protect the mortgagee against waste or other abuse of his possession by the mortgagor, the court may order the property sold. The farmer's proceeding in bankruptcy for rehabilitation, resembles that of a corporation for reorganization. As to the latter it is expressly provided that the debtor may, to some extent, be left in possession, U. S. Code, Title 11, §207 (c); and it is common practice to appoint as receivers one of the officials of the corporation.

In conclusion, consideration was given to the contention that the delay in the enforcement of the mortgage and limitations placed upon the mortgagee are not merely permissible modifications of the creditor's remedy, but alterations of rights also. In answer to this contention, the Court pointed out that the question involved is not one of state action permissible under the police power in respect of a contract, but rather whether the exercise of the bankruptcy power is compatible with the due process clause of the Fifth Amendment. Declaring that the provisions of the Act work no *unreasonable* change in the creditor's rights, the opinion concludes as follows:

"But the question here involved is not one of state action under the police power alleged to violate the contract clause. The power here exerted by Congress is the broad power 'To establish . . . uniform Laws on the subject of Bankruptcies throughout the United States' The question which the objections raise is not whether the Act does more than modify remedial rights. It is whether the legislation modifies the secured creditor's rights, remedial or substantive, to such an extent as to deny the due process of law guaranteed by the Fifth Amendment. A court of bankruptcy may affect the interests of lien holders in many ways. To carry out the purposes of the Bankruptcy Act, it may direct that all liens upon property forming part of a bankrupt's estate be marshalled; or that the property be sold free of encumbrances and the rights of all lien holders be transferred to the proceeds of the sale. . . . Despite the peremptory terms of a pledge, it may enjoin sale of the collateral, if it finds that the sale would hinder or delay preparation or consummation of a plan of reorganization. . . . It may enjoin like action by a mortgagee which would defeat the purpose of subsection (s) to effect rehabilitation of the farmer mortgagor. For the reasons stated, we are of opinion that the provisions of subsection (s) make no unreasonable modification of the mortgagee's rights; and hence are valid."

The case was argued by Messrs. Samuel S. Lambeth, Jr., Elmer McClain and William Lemke for the petitioner, and by Messrs. T. X. Parsons, and John Strickler, pro hac vice by special leave of Court for the respondents.

State Statutes—Minimum Wages for Women

The Washington statute providing for the fixing of minimum wages for women and minors is a valid exercise of the police power of the State. Adkins v. Children's Hospital is over-ruled.

West Coast Hotel Company v. Parrish, 81 Adv. Op. 455; 57 Sup. Ct. Rep. 578.

In this case the Supreme Court, by a divided bench, sustained the statute of the State of Washington authorizing the fixing of wages for women and minors. The Act as originally passed in 1913 recited that the welfare of the State demands the protection of women and minors from conditions of labor having a pernicious effect on their health and morals. It provides that it shall be unlawful to employ women or minors in any industry or occupation in the State under conditions of labor detrimental to their health or morals; and that it shall be unlawful to employ women in any industry at wages which are not adequate for their maintenance. The Act created an Industrial Welfare Commission to establish such standards of wages and conditions of labor for women and minors as shall be held under the Act to be reasonable and not detrimental to health and morals, and shall be sufficient for the decent maintenance of women.

Other provisions prescribed procedure for the fixing of wages and empowered the Commission, after hearing and finding that in any occupation the wages paid to women "are inadequate to supply them necessary cost of living and to maintain the workers in health," to call a conference of representatives of employers, employees and disinterested persons representing the public. It was provided that the conference was to recommend to the Commission, on its request, an estimate of the minimum wage adequate for the purpose above stated and on the approval of such recommenda-

tion it became the duty of the Commission to issue an obligatory order fixing minimum wages.

By later Act the Commission was abolished and its duties were assigned to the Industrial Welfare Committee.

The appellant operates a hotel and employed the appellee, Elsie Parish, as a chambermaid. She and her husband brought suit to recover the difference between the wages paid her and the minimum wage fixed by the Act. The minimum wage was $14.50 for a week of 48 hours. The appellant challenged the statute as violative of the due process clause of the Fourteenth Amendment, but the State Supreme Court sustained the Act. On appeal the decision was affirmed by the Supreme Court by an opinion by the CHIEF JUSTICE, with four Justices dissenting.

The Hotel Company relied on the case of *Adkins v. Children's Hospital*, 261 U. S. 525, which struck down the minimum wage act of the District of Columbia as repugnant to the due process clause of the Fifth Amendment. The appellees sought to distinguish the *Adkins* case on the ground that the appellee was employed in a hotel and that the business of an innkeeper is affected with a public interest. But the opinion dismissed this attempted distinction by calling attention to the fact that in one of the cases ruled by the *Adkins* opinion the employee was a woman employed to operate an elevator in a hotel. Next referred to was the recent case of *Morehead v. New York ex rel. Tipaldo*, 298 U. S. 587, in which the Court by divided bench declared unconstitutional the New York Minimum Wage Act for Women, the majority of the Court there being unable to distinguish the New York Act from that passed on in the *Adkins* case. Attention was called particularly to the fact that in the *Morehead* case the petition for certiorari sought merely to distinguish the *Adkins* case rather than a fresh consideration of the principles on which it rested; and that consequently the majority of the Court had not considered whether the *Adkins* case should have been overruled.

In the case at bar, however, the decision in the *Adkins* case was re-examined. As to the reasons for this the opinion states:

"We think that the question which was not deemed to be open in the *Morehead* case is open and is necessarily presented here. The Supreme Court of Washington has upheld the minimum wage statute of that State. It has decided that the statute is a reasonable exercise of the police power of the State. In reaching that conclusion the state court has invoked principles long established by this Court in the application of the Fourteenth Amendment. The state court has refused to regard the decision in the *Adkins* case as determinative and has pointed to our decisions both before and since that case as justifying its position. We are of the opinion that this ruling of the state court demands on our part a reexamination of the *Adkins* case. The importance of the question, in which many States having similar laws are concerned, the close division by which the decision in the *Adkins* case was reached, and the economic conditions which have supervened, and in the light of which the reasonableness of the exercise of the protective power of the State must be considered, make it not only appropriate, but we think imperative, that in deciding the present case the subject should receive fresh consideration."

Then followed a brief review of the history of litigation on this question. It was pointed out that the Washington Act was enacted over 23 years ago; that it has been twice held valid by the State Supreme Court; that it is essentially the same as an act passed in Oregon the same year; and that the Oregon act, after reargument, was affirmed by the Supreme Court by equally divided bench in 1917. The District of Columbia act was passed in 1918, was sustained by the Supreme Court of the District in the *Adkins* case, was affirmed by the Court of Appeals of the District, then reversed on rehearing and finally held invalid by the Supreme Court with CHIEF JUSTICE TAFT, MR. JUSTICE HOLMES and MR. JUSTICE SANFORD dissenting, and MR. JUSTICE BRANDEIS taking no part. Later, similar acts of Arizona and Arkansas were held invalid under the *Adkins* case.

Consideration was then given to the principles which should control decision of the case. Noting that the due process clauses of the Fifth and Fourteenth Amendments are invoked against legislation of this type, on the ground that such legislation deprives women of freedom of contract, MR. CHIEF JUSTICE HUGHES said:

"... What is that freedom? The Constitution does not speak of freedom of contract. It speaks of liberty and prohibits the deprivation of liberty without due process of law. In prohibiting that deprivation the Constitution does not recognize an absolute and uncontrollable liberty. Liberty in each of its phases has its history and connotation. But the liberty safeguarded is liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals and welfare of the people. Liberty under the Constitution is thus necessarily subject to the restraints of due process, and regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process."

and quoting from *Chicago, B. & Q. R. R. Co. v. McGuire*, 219 U. S. 549, 565, the CHIEF JUSTICE continued:

"'There is no absolute freedom to do as one wills or to contract as one chooses. The guaranty of liberty does not withdraw from legislative supervision that wide department of activity which consists of the making of contracts, or deny to government the power to provide restrictive safeguards. Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community.'"

Numerous illustrations of restrictions on freedom of contract were then cited. Among these, special emphasis was placed on the opinion in *Holden v. Hardy*, 169 U. S. 366, wherein the Court pointed out the inequality existing between employer and employes which may occasion legislation for the protection of the health and welfare of the latter.

The principle thus referred to was thought peculiarly applicable to the employment of women. In elaboration of this the opinion states:

It is manifest that this established principle is peculiarly applicable in relation to the employment of women in whose protection the State has a special interest. That phase of the subject received elaborate consideration in *Muller* v. *Oregon* (1908), 208 U. S. 412, where the constitutional authority of the State to limit the working hours of women was sustained. We emphasized the consideration that 'woman's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence" and that her physical well being 'becomes an object of public interest and care in order to preserve the strength and vigor of the race.' We emphasized the need of protecting woman against oppression despite her possession of contractual rights. We said that 'though limitations upon personal and contractual rights may be removed by legislation, there is that in her disposition and habits of life which will operate against a full assertion of those rights. She will still be where some legislation to protect her seems necessary to secure a real equality of right.' Hence she was 'properly placed in a class by herself, and legislation designed for her pro-

tection may be sustained even when like legislation is not necessary for men and could not be sustained.' We concluded that the limitations which the statute there in question 'placed upon her contractual powers, upon her right to agree with her employer as to the time she shall labor' were 'not imposed solely for her benefit, but also largely for the benefit of all.'"

In addition, decisions upholding the regulation of the *hours of employment* of women were also cited. These precedents had been relied on by the dissenting justices in the *Adkins* case, and the validity of the distinction there made between a minimum wage and a maximum of hours in limiting liberty of contract was challenged in the dissent.

"... That challenge persists and is without any satisfactory answer. As Chief Justice Taft observed: 'In absolute freedom of contract the one term is as important as the other, for both enter equally into the consideration given and received, a restriction as to the one is not greater in essence than the other and is of the same kind. One is the multiplier and the other the multiplicand.' And Mr. Justice Holmes, while recognizing that 'the distinctions of the law are distinctions of degree,' could 'perceive no difference in the kind or degree of interference with liberty, the only matter with which we have any concern, between the one case and the other. The bargain is equally affected whichever half you regulate.'"

The CHIEF JUSTICE recalled also that the majority opinion in the *Adkins* case condemned the District of Columbia law for failure to take into account the *value of the services* rendered, and that in the *Morehead* case the minority thought that the New York statute amply met this objection. It was noted, however, that the Washington statute is similar to the District of Columbia Act in this respect. But this was thought insufficient to condemn the statute, in view of the fact that the minimum wage is fixed after conference by representatives of employers, employes and public, so that it may be assumed that the minimum wage is fixed in relation to the service performed. The view was then expressed that the decision in the *Adkins* case was a departure from the true principles governing the regulation by the State of the relation of the employer and employe. After reference to later authorities, particularly *Nebbia* v. *New York*, 291 U. S. 502, sustaining a New York law providing for minimum prices for milk, the learned CHIEF JUSTICE added:

"With full recognition of the earnestness and vigor which characterize the prevailing opinion in the *Adkins* case, we find it impossible to reconcile that ruling with these well-considered declarations. What can be closer to the public interest than the health of women and their protection from unscrupulous and overreaching employers? And if the protection of women is a legitimate end of the exercise of state power, how can it be said that the requirement of the payment of a minimum wage fairly fixed in order to meet the very necessities of existence is not an admissible means to that end? The legislature of the State was clearly entitled to consider the situation of women in employment, the fact that they are in the class receiving the least pay, that their bargaining power is relatively weak, and that they are the ready victims of those who would take advantage of their necessitous circumstances. The legislature was entitled to adopt measures to reduce the evils of the 'sweating system,' the exploiting of workers at wages so low as to be insufficient to meet the bare cost of living thus making their very helplessness the occasion of a most injurious competition. The legislature had the right to consider that its minimum wage requirements would be an important aid in carrying out its policy of protection. The adoption of similar requirements by many States evidences a deepseated conviction both as to the presence of the evil and as to the means adapted to check it. Legislative response to that conviction cannot be regarded as arbitrary or capricious, and that is all we have to decide. Even if the wisdom of the policy be regarded as debatable and its effects uncertain, still the legislature is entitled to its judgment."

In conclusion the majority opinion observed that recent economic experience had demonstrated the necessity for protecting a class of workers who are in an unequal position with respect to bargaining power. In this connection it was pointed out that what the workers lose in wages the taxpayers are called upon to pay in relief. In elaboration of this the opinion stated:

"... The exploitation of a class of workers who are in an unequal position with respect to bargaining power and are thus relatively defenceless against the denial of a living wage is not only detrimental to their health and well being but casts a direct burden for their support upon the community. What these workers lose in wages the taxpayers are called upon to pay. The bare cost of living must be met. We may take judicial notice of the unparalleled demands for relief which arose during the recent period of depression and still continue to an alarming extent despite the degree of economic recovery which has been achieved. It is unnecessary to cite official statistics to establish what is of common knowledge through the length and breadth of the land. While in the instant case no factual brief has been presented, there is no reason to doubt that the State of Washington has encountered the same social problem that is present elsewhere. The community is not bound to provide what is in effect a subsidy for unconscionable employers. The community may direct its law-making power to correct the abuse which springs from their selfish disregard of the public interest. The argument that the legislation in question constitutes an arbitrary discrimination, because it does not extend to men, is unavailing. This Court has frequently held that the legislative authority, acting within its proper field, is not bound to extend its regulation to all cases which it might possibly reach. ..."

In affirming the judgment of the State Court, the *Adkins* case was expressly overruled.

MR. JUSTICE SUTHERLAND delivered a dissenting opinion in which MR. JUSTICE VAN DEVANTER, MR. JUSTICE MCREYNOLDS and MR. JUSTICE BUTLER concurred.

This opinion opens with a discussion of the duty of the judiciary in cases involving constitutional questions, in which it was emphasized that each justice is bound by oath to exercise his own deliberate judgment.

"The suggestion that the only check upon the exercise of the judicial power, when properly invoked, to declare a constitutional right superior to an unconstitutional statute is the judge's own faculty of self-restraint, is both ill considered and mischievous. Self-restraint belongs in the domain of will and not of judgment. The check upon the judge is that imposed by his oath of office, by the Constitution and by his own conscientious and informed convictions; and since he has the duty to make up his own mind and adjudge accordingly, it is hard to see how there could be any other restraint."

As to the view that supervening economic conditions require a reconsideration of the question involved MR. JUSTICE SUTHERLAND said, in part:

"It is urged that the question involved should now receive fresh consideration, among other reasons, because of 'the economic conditions which have supervened'; but the meaning of the Constitution does not change with the ebb and flow of economic events. We frequently are told in more general words that the Constitution must be construed in the light of the present. If by that it is meant that the Constitution is made up of living words that apply to every new condition which they include, the statement is quite true. But to say, if that be intended, that the words of the Constitution mean today what they did not mean when written—that is, that they do not apply to a situation now to which they would have applied then—is

to rob that instrument of the essential element which continues it in force as the people have made it until they, and not their official agents, have made it otherwise. . . .

In elaboration of this view various authorities were cited including Cooley on "Constitutional Limitations" wherein the author states that,

"'. . . What a court is to do, therefore, is *to declare the law as written,* leaving it to the people themselves to make such changes as new circumstances may require. The meaning of the constitution is fixed when it is adopted, and it is not different at any subsequent time when a court has occasion to pass upon it.'"

It was observed further that the *Adkins* case dealt with an act of Congress which had been passed upon and approved by both the executive and legislative branches of the government, but notwithstanding had been overturned by the Court. This observation led to a discussion of the interrelationship of the three branches of government created by the Constitution, in which MR. JUSTICE SUTHERLAND said:

"The people by their Constitution created three separate, distinct, independent and coequal departments of government. The governmental structure rests, and was intended to rest, not upon any one or upon any two, but upon all three of these fundamental pillars. It seems unnecessary to repeat, what so often has been said, that the powers of these departments are different and are to be exercised independently. The differences clearly and definitely appear in the Constitution. Each of the departments is an agent of its creator; and one department is not and cannot be the agent of another. Each is answerable to its creator for what it does, and not to another agent. The view, therefore, of the Executive and of Congress that an act is constitutional is persuasive in a high degree; but it is not controlling."

Attention was then given specifically to the validity of the Washington statute and it was noted that it is identical in all substantial respects with that involved in the *Adkins* case. It was pointed out, moreover, that it is well established that the due process clause protects freedom of contract and that contracts of employment are within the rule. It was recognized in the *Adkins* case also that freedom of contract is not absolute but subject to a great variety of restraints. The restraints, however, are the exception and not the rule. The classes of cases in which restraints on freedom of contract have been recognized as set forth in the *Adkins* case included statutes fixing the *hours of labor,* but emphasis was placed on the distinction between such statutes and those fixing *minimum wages.* As to validity of this distinction, the opinion in the *Adkins* case was cited and MR. JUSTICE SUTHERLAND then added:

". . . What is there said need not be repeated. It is enough for present purposes to say that statutes of the former class deal with an incident of the employment, having no necessary effect upon wages. The parties are left free to contract about wages, and thereby equalize such additional burdens as may be imposed upon the employer as a result of the restrictions as to hours by an adjustment in respect of the amount of wages. This court, wherever the question is adverted to, has been careful to disclaim any purpose to uphold such legislation as fixing wages, and has recognized an essential difference between the two."

The failure of the law to take into consideration the value of the services rendered in fixing the wage was again urged as it was in the *Adkins* case. In this connection, the following, among other portions of the *Adkins* opinion, was quoted:

"'The law takes account of the necessities of only one party to the contract. It ignores the necessities of the employer by compelling him to pay not less than a certain sum, not only whether the employee is capable of earning it, but irrespective of the ability of his business to sustain the burden, generously leaving him, of course, the privilege of abandoning his business as an alternative for going on at a loss. Within the limits of the minimum sum, he is precluded, under penalty of fine and imprisonment, from adjusting compensation to the differing merits of his employees. . . . The ethical right of every worker, man or woman, to a living wage may be conceded. One of the declared and important purposes of trade organizations is to secure it. And with that principle and with every legitimate effort to realize it in fact, no one can quarrel; but the fallacy of the proposed method of attaining it is that it assumes that every employer is bound at all events to furnish it. The moral requirement implicit in every contract of employment, viz, that the amount to be paid and the service to be rendered shall bear to each other some relation of just equivalence, is completely ignored. The necessities of the employee are alone considered and these arise outside of the employment, are the same when there is no employment, and as great in one occupation as in another. Certainly the employer by paying a fair equivalent for the service rendered, though not sufficient to support the employee, has neither caused nor contributed to her poverty. On the contrary, to the extent of what he pays he has relieved it. In principle, there can be no difference between the case of selling labor and the case of selling goods.'"

The statute was thought to be repugnant to the Constitution also as an arbitrary discrimination because it leaves men free to bargain for wages lower than the minimum fixed for women. As to this feature the dissenting opinion states in part:

"An appeal to the principles that the legislature is free to recognize degrees of harm and confine its restrictions accordingly, is but to beg the question, which is—since the contractual rights of men and women are same, does the legislation here involved, by restricting only the rights of women to make contracts as to wages, create an arbitrary discrimination? We think it does. Difference of sex affords no reasonable ground for making a restriction applicable to the wage contracts of all working women from which like contracts of all working men are left free. Certainly a suggestion that the bargaining ability of the average woman is not equal to that of the average man would lack substance. The ability to make a fair bargain, as everyone knows, does not depend upon sex."

In conclusion, the question as to the power to fix a maximum wage was suggested:

"Finally, it may be said that a statute absolutely fixing wages in the various industries at definite sums and forbidding employers and employees from contracting for any other than those designated, would probably not be thought to be constitutional. It is hard to see why the power to fix minimum wages does not connote a like power in respect of maximum wages. And yet, if both powers be exercised in such a way that the minimum and the maximum so nearly approach each other as to become substantially the same, the right to make any contract in respect of wages will have been completely abrogated."

The case was argued by Mr. E. L. Skeel for the appellant, and by Mr. W. A. Toner for the appellees.

National Labor Relations Act—Interstate Commerce

The National Labor Relations Act is a valid exercise by Congress of its power under the commerce clause of the Constitution for the purpose of preventing strikes and labor disturbances affecting interstate commerce.

National Labor Relations Board vs. Jones & Laughlin Steel Corporation, 81 Adv. Op. 563; 57 Sup. Ct. Rep. 615.

Same vs. Fruehauf Trailer Company, (2 cases), 81 Adv. Op. 582; 57 Sup. Ct. Rep. 642.

Same vs. Friedman-Harry Marks Clothing Co., Inc., 81 Atlv. Op. 585; 57 Sup. Ct. Rep. 645.

Associated Press vs. National Labor Relations Board, 81 Adv. Op. 603; 57 Sup. Ct. Rep. 650.

Washington, Virginia & Maryland Coach Co. vs. Nat'l Labor Relations Board, 81 Adv. Op. 601; Sup. Ct. Rep. 648.

In five cases, all decided April 12, 1937, the Supreme Court sustained the validity of the National Labor Relations Act of 1935 as applied in the circumstances of the respective cases.

The opinions in three cases were delivered by MR. CHIEF JUSTICE HUGHES in *National Labor Relations Board vs. Jones & Laughlin Steel Corporation*. In two of the cases MR. JUSTICE ROBERTS delivered the opinion of the Court. In all of the cases, except No. 469, *Washington, Virginia and Maryland Coach Company vs. National Labor Relations Board*, MR. JUSTICE VAN DEVANTER, MR. JUSTICE MCREYNOLDS, MR. JUSTICE SUTHERLAND and MR. JUSTICE BUTLER dissented.

In the *Jones & Laughlin Steel Corporation* case, the proceeding was instituted before the National Labor Relations Board by the Beaver Valley Lodge No. 200, affiliated with the Amalgamated Association of Iron, Steel and Tin Workers of America, a labor organization, charging that the Steel Corporation had violated the Act in engaging in unfair labor practices affecting commerce. The unfair practices charged were that the Corporation discriminated against members of the union with regard to hire and tenure of employment and was coercing and intimidating its employees in order to interfere with their self-organization by discharging certain employees. The Board sustained the charges, ordered the Corporation to cease and desist from the practices, to offer reinstatement to ten of the employees named, to make good their losses and to post for thirty days notices that the Corporation would not discharge or discriminate against union members. Upon the Corporation's failure to comply, the Board petitioned the Circuit Court of Appeals to enforce the order. That Court denied the petition on the ground that the order exceeded federal power. On certiorari its decision was reversed in an opinion by the CHIEF JUSTICE.

In the opinion the scheme of the National Labor Relations Act was outlined. It sets forth findings with respect to the injury to commerce resulting from interference with the rights of employees to organize and from the refusal of employers to accept the procedure of collective bargaining. The Act declares that it is the policy of the government to eliminate these causes of obstruction to the free flow of commerce. It defines various terms, including the terms "commerce" and "affecting commerce." It creates the National Labor Relations Board and prescribes its organization. It sets forth the rights of employees to organize and to bargain collectively through representatives of their own choosing. It defines "unfair labor practices." It lays down rules for the employees for the purpose of collective bargaining. It empowers the Board to prevent the described unfair labor practices and authorizes the Board to petition designated courts for enforcement of its orders. The order in question was made after complaint, notice and hearing. The Steel Corporation appeared specially, contesting the jurisdiction of the Board and setting up the constitutional invalidity of the statute. After hearing evidence the Board sustained the charges and issued the order complained of.

The Steel Corporation contended (1) that the Act is a regulation of labor relations and not of interstate commerce; (2) that the Act can have no application to respondent's relations with its production employees because they are not subject to federal regulation; and (3) that the provisions of the Act violate Section 2 of Article III and the Fifth and Seventh Amendments of the federal Constitution.

In rejecting these contentions MR. CHIEF JUSTICE HUGHES reviewed the findings of the Board as to the nature and scope of the Steel Corporation's business. Among others the Board found that the Corporation is the fourth largest producer of steel in the United States, which, with its 19 subsidiaries, is a completely integrated enterprise owning and operating ore, coal and limestone properties, lake and river transportation facilities and terminal and connecting railroads. The various properties are located in many states. It has sales offices in twenty cities in the United States and a wholly owned subsidiary, which is its distributor in Canada. Its iron and steel manufacturing plants are located in Pittsburgh and Aliquippa, Pennsylvania. About 75% of its product is shipped out of Pennsylvania. Summarizing the Corporation's operations, the Board stated that the works in Pittsburgh and Aliquippa "might be likened to the heart of a self-contained, highly integrated body. They draw in the raw materials from Michigan, Minnesota, West Virginia, Pennsylvania in part through arteries and by means controlled by the respondent; they transform the materials and then pump them out to all parts of the nation through the vast mechanism which the respondent has elaborated."

To carry out the activities of the Corporation 33,000 men mine ore, 44,000 mine coal, 4,000 quarry limestone, 16,000 manufacture coke, 343,000 manufacture steel, and 83,000 transport its products.

Evidence was also taken by the Board as to relations between the Corporation and its employees, and the Board found that the Corporation had discharged certain employees because of their union activity and for the purpose of discouraging membership in the union.

After a review of these findings the Court turned its attention to the questions of law raised. The first legal question considered related to the scope of the Act. It was raised in the respondent's contention that the Act attempts to regulate all industry and invades the reserved powers of the states over their local concerns; that the references in the Act to interstate commerce are colorable at best; that it is not a true regulation of commerce or matters directly affecting it, but is designed to place under compulsory federal supervision all industrial labor relations in the nation. The Court, however, was of the opinion that the Act may be construed so as to operate within the sphere of federal constitutional power. The jurisdictional provisions and their effect were described as follows:

"The jurisdiction conferred upon the Board, and invoked in this instance, is found in Section 10 (a), which provides:

" 'Sec. 10 (a). The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce'

"The critical words of this provision, prescribing the limits of the Board's authority in dealing with the labor practices, are 'affecting commerce.' The Act specifically defines the 'commerce' to which it refers (sec. 2 (6)):

" 'The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State

but through any other State or any Territory or the District of Columbia or any foreign country.'

" 'There can be no question that the commerce thus contemplated by the Act (aside from that within a Territory or the District of Columbia) is interstate and foreign commerce in the constitutional sense. The Act also defines the term 'affecting commerce' (sec. 2 (7)):

" 'The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.'

"This definition is one of exclusion as well as inclusion. The grant of authority to the Board does not purport to extend to the relationship between all industrial employees and employers. Its terms do not impose collective bargaining upon all industry regardless of effects upon interstate or foreign commerce. It purports to reach only what may be deemed to burden or obstruct that commerce and, thus qualified, it must be construed as contemplating the exercise of control within constitutional bounds. It is a familiar principle that acts which directly burden or obstruct interstate or foreign commerce, or its free flow, are within the reach of the congressional power. Acts having that effect are not rendered immune because they grow out of labor disputes. . . . It is the effect upon commerce, not the source of the injury, which is the criterion. . . . Whether or not particular action does affect commerce in such a close and intimate fashion as to be subject to federal control, and hence to lie within the authority conferred upon the Board, is left by the statute to be determined as individual cases arise. We are thus to inquire whether in the instant case the constitutional boundary has been passed."

Next referred to were the unfair labor practices involved. In sustaining the definition of "unfair labor practices," the Court pointed out that the Act goes no further than to safeguard the right of employees to self-organization, and to select representatives of their own choosing for collective bargaining or other mutual protection without restraint or coercion. In upholding this right the Court cited similar provisions of the Railway Labor Act which had been sustained and said:

"Thus, in its present application, the statute goes no further than to safeguard the right of employees to self-organization and to select representatives of their own choosing for collective bargaining or other mutual protection without restraint or coercion by their employer.

"That is a fundamental right. Employees have as clear right to organize and select their representatives for lawful purposes as the respondent has to organize its business and select its own officers and agents. Discrimination and coercion to prevent the free exercise of the right of employees to self-organization and representation is a proper subject for condemnation by competent legislative authority. Long ago we stated the reason for labor organizations. We said that they were organized out of the necessities of the situation; that a single employee was helpless in dealing with an employer; that he was dependent ordinarily on his daily wage for the maintenance of himself and family; that if the employer refused to pay him the wages that he thought fair, he was nevertheless unable to leave the employ and resist arbitrary and unfair treatment; that union was essential to give laborers opportunity to deal on an equality with their employer . . . We reiterated these views when we had under consideration the Railway Labor Act of 1926. Fully recognizing the legality of collective action on the part of employees in order to safeguard their proper interests, we said that Congress was not required to ignore this right but could safeguard it. Congress could seek to make appropriate collective action of employees an instrument of peace rather than of strife. We said that such collective action would be a mockery if representation were made futile by interference with freedom of choice. Hence the prohibition by Congress of interference with the selection of representatives for the purpose of negotiation and conference between employers and employees, 'instead of being an invasion of the constitutional right of either, was based on the recognition of the rights of both' . . . We have reasserted the same principle in sustaining the application of the Railway Labor Act as amended in 1934."

The third legal question considered was the crucial one whether the Act is valid as applied to employees engaged in production. The Steel Corporation argued that whatever may be the law as to employees engaged in interstate commerce, manufacturing in itself is not commerce and the relations between employees and employer therein are not subject to federal regulation. In support of this contention numerous decisions were cited including the *Schechter* case, 295 U. S. 495, and the *Carter Coal* case, 298 U. S. 238. But the government distinguished these cases urging that the activities constituted a stream of commerce of which the manufacturing plant is the focal point at which industrial strife would cripple the entire flow. The government's contention in this regard was explained as follows in the opinion:

"The various parts of respondent's enterprise are described as interdependent and as thus involving 'a great movement of iron ore, coal and limestone along well-defined paths to the steel mills, thence through them, and thence in the form of steel products into the consuming centers of the country—a definite and well-understood course of business.' It is urged that these activities constitute a 'stream' or 'flow' of commerce, of which the Aliquippa manufacturing plant is the focal point, and that industrial strife at that point would cripple the entire movement. Reference is made to our decision sustaining the Packers and Stockyards Act. *Stafford* v. *Wallace*, 258 U. S. 495. The Court found that the stockyards were but a 'throat' through which the current of commerce flowed and the transactions which there occurred could not be separated from that movement. Hence the sales at the stockyards were not regarded as merely local transactions, for while they created 'a local change of title' they did not 'stop the flow,' but merely changed the private interests in the subject of the current. Distinguishing the cases which upheld the power of the State to impose a non-discriminatory tax upon property which the owner intended to transport to another State, but which was not in actual transit and was held within the State subject to the disposition of the owner, the Court remarked: 'The question, it should be observed, is not with respect to the extent of the power of Congress to regulate interstate commerce, but whether a particular exercise of state power in view of its nature and operation must be deemed to be in conflict with this paramount authority.' . . . Applying the doctrine of *Stafford* v. *Wallace*, . . . the Court sustained the Grain Futures Act of 1922 with respect to transactions on the Chicago Board of Trade, although these transactions were 'not in and of themselves interstate commerce.' Congress had found that they had become 'a constantly recurring burden and obstruction to that commerce.' "

The Steel Corporation pointed to various aspects of its business which it urged removed the Aliquippa plant from the flow of commerce and argued that if importation and exportation in interstate commerce do not singly remove local activities into the field of federal power, it should follow that their combination would not alter the situation. The Court found it unnecessary to determine whether the features urged dispose of the analogy to the stream of commerce cases and said:

" . . . The instances in which that metaphor has been used are but particular, and not exclusive, illustrations of the protective power which the Government invokes in support of the present Act. The congressional authority to protect interstate commerce from burdens and obstructions is not limited to transactions which can be deemed to be an essential part of a 'flow' of interstate or foreign

commerce. Burdens and obstructions may be due to injurious action springing from other sources. The fundamental principle is that the power to regulate commerce is the power to enact 'all appropriate legislation' for 'its protection and advancement'; . . . to adopt measures 'to promote its growth and insure its safety'; . . . 'to foster, protect, control and restrain.' . . . That power is plenary and may be exerted to protect interstate commerce 'no matter what the source of the dangers which threaten it.' . . . Although activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control. . . . Undoubtedly the scope of this power must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what national and what is local and create a completely centralized government. . . . The question is necessarily one of degree."

The opinion points out further that it is established that intrastate activities by reason of their proximity to interstate commerce may come within the range of federal power. A notable example of this may be found in intrastate railroad rates which are subject to federal regulation by reason of their relation to interstate rates and to prevent discrimination against interstate commerce. Further illustration was cited in the cases sustaining the exercise of federal power under the Sherman Anti-Trust Act.

"The close and intimate effect which brings the subject within the reach of federal power may be due to activities in relation to productive industry although the industry when separately viewed is local. This has been abundantly illustrated in the application of the federal Anti-Trust Act. . . .

* * *

"Upon the same principle, the Anti-Trust Act has been applied to the conduct of employees engaged in production . . . The decisions dealing with the question of that application illustrate both the principle and its limitation. Thus, in the first *Coronado* case, the Court held that mining was not interstate commerce, that the power of Congress did not extend to its regulation as such, and that it had not been shown that the activities there involved—a local strike—brought them within the provisions of the Anti-Trust Act, notwithstanding the broad terms of that statute. A similar conclusion was reached in *United Leather Workers* v. *Herkert* [265 U. S. 457], *Industrial Association* v. *United States, supra,* and *Levering & Garrigues Co.* v. *Morrin,* 289 U. S. 103, 107. But in the first *Coronado* case the Court also said that 'if Congress deems certain recurring practices, though not really part of interstate commerce, likely to obstruct, restrain or burden it, it has the power to subject them to national supervision and restraint.' 259 U. S. p. 408. And in the second *Coronado* case the Court ruled that while the mere reduction in supply of an article to be shipped in interstate commerce by the illegal or tortious prevention of its manufacture or production is ordinarily an indirect and remote obstruction to that commerce, nevertheless when the 'intent of those unlawfully preventing the manufacture or production is shown to be to restrain or control the supply entering and moving in interstate commerce, or the price of it in interstate markets, their action is a direct violation of the Anti-Trust Act.' 268 U. S. p. 310. And the existence of that intent may be a necessary inference from proof of the direct and substantial effect produced by the employees' conduct. *International Association* v. *United States,* 268 U. S. p. 81. What was absent from the evidence in the first *Coronado* case appeared in the second and the Act was accordingly applied to the mining employees.

"It is thus apparent that the fact that the employees here concerned were engaged in production is not determinative. The question remains as to the effect upon interstate commerce of the labor practice involved. In the *Schechter* case, *supra,* we found that the effect there was so remote as to be beyond the federal power. To find 'immediacy or directness' there was to find it 'almost everywhere,' a result inconsistent with the maintenance of our federal system. In the *Carter* case, *supra,* the Court was of the opinion that the provisions of the statute relating to production were invalid upon several grounds,—that there was improper delegation of legislative power, and that the requirements not only went beyond any sustainable measure of protection of interstate commerce but were also inconsistent with due process. These cases are not controlling here."

The opinion further stated that even when full weight is given to the contention that the manufacturing process constitutes a break in the stream of commerce, the fact remains, nevertheless, that stoppage of the operations would have a serious effect upon interstate commerce. In elaboration of this the learned CHIEF JUSTICE said:

"In view of respondent's far-flung activities, it is idle to say that the effect would be indirect or remote. It is obvious that it would be immediate and might be catastrophic. We are asked to shut our eyes to the plainest facts of our national life and to deal with the question of direct and indirect effects in an intellectual vacuum. Because there may be but indirect and remote effects upon interstate commerce in connection with a host of local enterprises throughout the country, it does not follow that other industrial activities do not have such a close and intimate relation to interstate commerce as to make the presence of industrial strife a matter of the most urgent national concern. When industries organize themselves on a national scale, making their relation to interstate commerce the dominant factor in their activities, how can it be maintained that their industrial labor relations constitute a forbidden field into which Congress may not enter when it is necessary to protect interstate commerce from the paralyzing consequences of industrial war? We have often said that interstate commerce itself is a practical conception. It is equally true that interferences with that commerce must be appraised by a judgment that does not ignore actual experience."

The Court then called attention to the fact that experience has demonstrated that the recognition of the employees' right to organize and select their own representatives for purposes of collective bargaining has been conducive to industrial peace, and the provisions of the Act preserving such rights were thought valid.

The opinion discussed also questions raised under the due process clause. They were disposed of, however, largely upon the same reasoning as that underlying the decision in the cases under the Railway Labor Act, particularly as set forth in the *Virginian Railway Co. v. System Federation No.* 40, reviewed herewith.

Nos. 420 and 421, *National Labor Relations Board v. Fruehauf Trailer Company,* involved proceedings by the National Labor Relations Board against Freuhauf Trailer Company, a concern engaged in the manufacture, assembly, sale and distribution of trailers and trailer parts and accessories. The respondent is a Michigan corporation with a plant located in Detroit, and is the largest concern of its kind in the United States. It maintains sales offices in 12 different states and has distributors and dealers in the principal cities of the country and through a subsidiary operates also in Canada. Its raw materials come from many states. It was charged with hiring a detective for purposes of espionage within the union and with discharging men for joining and activity in the union. It gave the de-

tective employment to qualify him for membership in the union and after joining the union he became its treasurer and gave a list of union members to the respondent. The Board ordered the respondent to desist from the unfair labor practices. On the findings as to the relation of the business to interstate commerce and as to the unfair practices charged, all supported by evidence, the Supreme Court reversed the decree of the Circuit Court of Appeals and sustained the ruling of the Board.

In Nos. 422 and 423, *National Labor Relations Board vs. Friedman-Harry Marks Clothing Company, Inc.*, the proceedings under the National Labor Relations Act were brought against the respondent, a corporation engaged in the manufacture, sale and distribution of men's clothing. It was charged with discharging employees because they had engaged in union activities. The Board sustained the charges and ordered the respondents to reinstate the discharged employees, to make good their loss of pay and to post notice for thirty days that the Company would cease and desist from the practices condemned.

It appeared that the respondent is a Virginia corporation with a plant at Richmond at which it manufactures men's clothing. Of its raw materials, 99.57 percent come from other states, and 82.8 percent of its manufactured products are purchased by customers outside the state. Elaborate findings were made with respect to the clothing manufacturing industry and its relation to interstate commerce.

Findings were also made in relation to the labor organization involved, from which it appeared that, during the period before recognition by the employers of the union, long and bitter strikes had occurred resulting in losses of millions of dollars to employers and employees. It was found further by the Board that since the signing of collective agreements for the New York area a total of 21,193 complaints and disputes have been handled by the New York Manufacturers Exchange and the Amalgamated. In only 898 of these cases, or slightly over 4%, was resort to arbitration made necessary by failure to agree. It was found, moreover, that the organization of collective bargaining machinery and the establishment of an impartial tribunal and the founding of unemployment insurance are the outstanding achievements of the industry, and that the Amalgamated Clothing Workers has been the largest single contributing factor to industrial harmony in the industry.

In view of the findings, supported by evidence, the orders of the Board were sustained, and the decree of the Circuit Court of Appeals refusing to enforce them was reversed, on the authority of the Jones & Laughlin Steel Corporation case.

No. 469—*Washington, Virginia and Maryland Coach Company v. National Labor Relations Board* involved a proceeding by the Board against the petitioner, which is engaged in operating motor busses for hire between the District of Columbia and the State of Virginia. The opinion in this case was written by MR. JUSTICE ROBERTS.

The employer here was charged with dismissing and refusing to reinstate certain drivers and garagemen because of their membership in Local No. 1079 of the Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, a labor organization. After hearing, the Board sustained the charges and entered an order prohibiting petitioner from discrimination against employees based on union membership or advocacy of collective bargaining. The order also required restoration of 18 employees with compensation for their losses due to discharge and the posting of notices that the employer would comply with the Board's order. Upon non-compliance, proceedings were brought in the Circuit Court of Appeals for enforcement of the order. That Court sustained the order and on certiorari this ruling was unanimously affirmed by the Supreme Court.

No contention was made in this case that the employer was other than an instrumentality of interstate commerce. The contention, however, that the Act on its face seeks to regulate labor relations in all employments, whether in interstate commerce or not, was held untenable.

With respect to the sufficiency of evidence to support the findings, the Court stated that it would not review the evidence or weigh the testimony. The Act in Section 10 (e) provides "the findings of the Board as to facts, if supported by evidence, shall be conclusive," and the Court observed that there was substantial evidence to support the findings. Other objections made by the petitioner were controlled by the *Jones & Laughlin Steel Corporation* case.

MR. JUSTICE MCREYNOLDS delivered a dissenting opinion in which MR. JUSTICE VAN DEVANTER, MR. JUSTICE SUTHERLAND and MR. JUSTICE BUTLER concurred. This opinion, applicable to Nos. 419, 420, 421, 422 and 423, states the minority's agreement with the decisions of the three Circuit Courts of Appeals, which opinions were set forth in full. For purposes of discussion, the dissenting opinion elaborates the Clothing Company case which involves a small industry as compared with the Steel Corporation. Its features are described with particularity, as set forth by the findings of the Board. The facts of the Clothing Company case were thus summarized as follows:

"A relatively small concern caused raw material to be shipped to its plant at Richmond, Virginia, converted this into clothing, and thereafter shipped the product to points outside the State. A labor union sought members among the employees at the plant and obtained some. The Company's management opposed this effort, and in order to discourage it discharged eight who had become members. The business of the Company is so small that to close its factory would have no direct or material effect upon the volume of interstate commerce in clothing. The number of operatives who joined the union is not disclosed; the wishes of other employees is not shown; probability of a strike is not found."

The dissenting opinion then urged that the record fails to show any basis for the exercise of federal power. As to this the opinion stated:

"The argument in support of the Board affirms 'Thus the validity of any specific application of the preventive measures of this Act depends upon whether industrial strife resulting from the practices in the particular enterprise under consideration would be of the character which Federal power could control if it occurred. If strife in that enterprise could be controlled, certainly it could be prevented.'

"Manifestly that view of Congressional power would extend it into almost every field of human industry. With striking lucidity, fifty years ago, *Kidd* v. *Pearson*, 128 U. S. 1, 21, declared: 'If it be held that the term [commerce with foreign nations and among the several states] includes the regulation of all such manufactures as are intended to be the subject of commercial transactions in the future, it is impossible to deny that it would also include all productive industries that contemplate the same thing. The result would be that Congress would be invested, to the exclusion of the States, with the power to regulate, not only manufactures, but also agriculture, horticulture, stock raising, domestic fisheries, mining—in short, every branch of

humane industry.' This doctrine found full approval in *United States* v. *E. C. Knight Co.*, 156 U. S. 1, 12, 13; *Schechter Poultry Corp., et al.* v. *United States, supra,* and *Carter* v. *Carter Coal Co., et al., supra,* where the authorities are collected and principles applicable here are discussed.

"In *Knight's* case Chief Justice Fuller, speaking for the Court, said: 'Doubtless the power to control the manufacture of a given thing involves in a certain sense the control of its disposition, but this is a secondary and not the primary sense; and although the exercise of that power may result in bringing the operation of commerce into play, it does not control it, and affects it only incidentally and indirectly. Commerce succeeds to manufacture, and is not a part of it . . . It is vital that the independence of the commercial power and of the police power, and the delimitation between them, however sometimes perplexing, should always be recognized and observed, for while the one furnishes the strongest bond of union, the other is essential to the preservation of the autonomy of the States as required by our dual form of government; and acknowledged evils, however grave and urgent they may appear to be, had better be borne, than the risk be run, in the effort to suppress them, of more serious consequences by resort to expedients of even doubtful constitutionality.'

"In *Schechter's* case we said: 'In determining how far the federal goverment may go in controlling intrastate transactions upon the ground that they "affect" interstate commerce, there is a necessary and well-established distinction between direct and indirect effects. The precise line can be drawn only as individual cases arise, but the distinction is clear in principle . . . But where the effect of intrastate transactions upon interstate commerce is merely indirect, such transactions remain within the domain of state power. If the commerce clause were construed to reach all enterprises and transactions which could be said to have an indirect effect upon interstate commerce, the federal authority would embrace practically all the activities of the people and the authority of the State over its domestic concerns would exist only by sufferance of the federal government. Indeed, on such a theory, even the development of the State's commercial facilities would be subject to federal control.

"*Carter's* case declared—'Whether the effect of a given activity or condition is direct or indirect is not always easy to determine. The word "direct" implies that the activity or condition invoked or blamed shall operate proximately—not mediately, remotely, or collaterally—to produce the effect. It connotes the absence of an efficient intervening agency or condition. And the extent of the effect bears no logical relation to its character. The distinction between a direct and an indirect effect turns, not upon the magnitude of either the cause or the effect, but entirely upon the manner in which the effect has been brought about. If the production by one man of a single ton of coal intended for interstate sale and shipment, and actually so sold and shipped, affects interstate commerce indirectly, the effect does not become direct by multiplying the tonnage, or increasing the number of men employed, or adding to the expense or complexities of the business, or by all combined.'

"Any effect on interstate commerce by the discharge of employees shown here, would be indirect and remote in the highest degree, as consideration of the facts will show. In No. 419 ten men out of ten thousand were discharged; in the other cases only a few. The immediate effect in the factory may be to create discontent among all those employed and a strike may follow, which, in turn, may result in reducing production, which ultimately may reduce the volume of goods moving in interstate commerce. By this chain of indirect and progressively remote events we finally reach the evil with which it is said the legislation under consideration undertakes to deal. A more remote and indirect interference with interstate commerce or a more definite invasion of the powers reserved to the states is difficult, if not impossible, to imagine.

"The Constitution still recognizes the existence of States with indestructible powers; the Tenth Amendment was supposed to put them beyond controversy."

In No. 365, *Associated Press vs. National Labor Relations Board,* the validity of the National Labor Relations Act was challenged as applied to the relations between the Associated Press and its employees engaged in editorial work in its news department.

The Board on complaint found that the Associated Press had discharged an employee for activities in the American Newspaper Guild, a labor organization. Based on these findings the Board made an order requiring the Associated Press to cease and desist from interfering with the membership and activities of its employees in the Newspaper Guild and directed the reinstatement of the employee who had been dismissed for his activities in the Guild. In a suit for enforcement of the order the Circuit Court of Appeals sustained the ruling of the Board. On certiorari the decision was affirmed by the Supreme Court by a divided bench. MR. JUSTICE ROBERTS delivered the prevailing opinion, and MR. JUSTICE SUTHERLAND delivered a dissenting opinion in which MR. JUSTICE VAN DEVANTER, MR. JUSTICE MCREYNOLDS and MR. JUSTICE BUTLER concurred.

The Board made findings as to the activities of the Associated Press in collecting, editing and transmitting news in interstate commerce, as to the nature of the type of employment in which the discharged employee was engaged and as to the charges of unfair labor practices made against the Associated Press. On the questions as to the activities of the petitioner in interstate commerce and the validity of the Act as applied to an employee engaged in editorial work in the news department, the Court relied on the decisions in *Virginian Ry. Co. v. System Federation No.* 40, and in *Railway Clerks'* case, 281 U. S. 548.

A further contention was that the statute, as applied, abridges the petitioner's right as to freedom of the press, as guaranteed by the First Amendment. In passing on this contention the Court was careful to emphasize that the petitioner is free to select its employees on the basis of their competence, and permits a discharge for any reason other than union activity or agitation for collective bargaining with employees. It was pointed out further that the discharge in question was found by the Board to have been for the employee's activity in the Guild and for his agitation for collective bargaining.

So far as freedom of the press is concerned, the Court concluded that the status of the Associated Press as an agency of the press does not entitle it to immunity from regulation. In this connection MR. JUSTICE ROBERTS said:

"The business of the Associated Press is not immune from regulation because it is an agency of the press. The publisher of a newspaper has no special immunity from the application of general laws. He has no special privilege to invade the right and liberties of others. He must answer for libel. He may be punished for contempt of court. He is subject to the anti-trust laws. Like others he must pay equitable and nondiscriminatory taxes on his business. The regulation here in question has no relation whatever to the impartial distribution of news. The order of the Board in nowise circumscribes the full freedom and liberty of the petitioner to publish the news as it desires it published or to enforce policies of its own choosing with respect to the editing and rewriting of news for publication, and the petitioner is free at any time to discharge Watson or any editorial employe who fails to comply with the policies it may adopt."

In the dissenting opinion, MR. JUSTICE SUTHERLAND urged that the Act as applied constitutes an infringement of the First Amendment, which forbids Congress to make any law abridging freedom of speech or of the press.

Members and Non-Members Take Same Stand

(*Continued from page* 343)

extent in the impairment or destruction of an independent judiciary, it by no means follows that American lawyers should or can devise *any acceptable method* of bringing about an unacceptable and subversive result. With all deference to those who seek sincerely a less destructive alternative and want help in support of it, the real difficulty seems to be inherent in the nature of the objective sought, rather than in lack of flexibility or adaptability in the deep-rooted convictions of the rank and file of lawyers.

Nevertheless, it may well be that when the legislation reaches the stage of action on the floor of the Senate or the House, the proposals will not closely resemble, except in principle and objective, those upon which the referenda were conducted; and it may be also that many or some of the proponents of the original proposals will be supporting substitute measures upon which the lawyers have not thus far voted their views. An advisable next step may therefore prove to be the development of a consensus of informed opinion, within the profession and outside of it, as to several of these suggested alternatives, some of which may be deemed by some people to be less objectionable than the original proposal as to the Supreme Court. It may be that the stage will be reached where some of these alternatives ought to be submitted, by the Association representatives, for the views and instructions of the membership or at least of the representative House of Delegates. In any event, it would not be sensible or patriotic, at this junction, for any citizen to brush all of these suggested alternatives aside or to deny to any of them a fair and open-minded re-examination as to their merits, if any, under existing conditions.

CONSIDERATION OF SUGGESTED ALTERNATIVE MEASURES

In order that members and non-members of the Association may be thinking about such alternatives, and may be stating their views about them freely to their representatives in the Congress and the Association, I undertake upon my own responsibility to bring together and to state for information what seem to be the principal substitute suggestions at this writing and to indicate for consideration some of the salient reasons for and against their acceptability:

(a) *Bills to increase the number of members of the Supreme Court permanently to eleven or thirteen Justices, without reference to the age or retirement of present members of the Court.*

Some such "compromise" is urged on the ground that the fixation of the membership of the Court at a definite, rather than a conditional or "flexible," number is within the constitutional power of the Congress; that it would not remake the Court so drastically; that it would satisfy the political demand for the immediate appointment of at least two or four new members of the Court, responsive to the desired views; and that it would involve less of direct, open reflection upon judges who have served their country long and well. It is urged also that if only one or two new Associate Justices came into the Court, the continuity of judicial work and decision would not thereby be destroyed or as greatly impaired, as one or two new members would be likely to fit into the work of the Court, whereas six new Justices would tend to become a separate and permanent bloc of "government judges," who would soon control the Court.

In opposition, it is urged that any increase in the size of the Court for political reasons would be destructive, and would give effect to an effort to change and supplant particular judicial decisions by decisions which would not be judicial in origin and to change the existing boundaries of the powers of government without letting the people decide whether they wish such a change. For the efficient functioning of a judicial tribunal, the experience of various States would indicate that nine members is about the maximum.

(b) *Amendments to the pending bill, to the effect that after whatever new Justices are appointed, no vacancies shall be filled until the membership of the Court has been restored to nine; and that under the bill not more than two Justices (or one) shall be appointed in any one calendar year, etc.*

In support of such amendments, which are pending as to the bill, it is urged that they would lessen the damage to the Court, in that the re-making would not be permanent; the Court would move back toward its normal size as members died or retired; and no more than two of the six "temporary" new members could be appointed in any one year—six during the next three years.

In opposition to acceptance of such an alternative, it is urged that these amendments recognize the unsoundness and dangers of the original proposal, by trying to prevent it from having lasting effects, and by spacing the six additional appointments at the rate of not more than two a year for the next three years; also that as soon as the "political emergency" passed and the Court was back to nine members, these six would control the Court. Like other suggestions based on changes in the pending bill, this proposal would give the people no opportunity to decide whether they wished such drastic changes to be made in the Court, or in what manner; it would keep the issue away from those who have the best right to decide it.

(c) *Separation of the pending bill into two or more parts, and the separate enactment of all except the proposal for remaking the Supreme Court.*

In behalf of this suggestion it is urged that obviously "something must be done" by way of legislation as to the Courts of the United States, and that the prac-

ticable way to defeat the re-making of the Supreme Court is to separate that proposal and pass the rest of the bill, even regardless of the merits of what it would do to the Circuit, District and other Courts. It is urged also that in several of the Circuits, and many of the Districts, there are sitting judges whose age is such as to incapacitate them from carrying on the full work of their Court unaided.

As to the move to divide the bill into parts, it has been suggested that any separation should be into at least three parts; viz., the proposal as to the Supreme Court, the proposal as to the Circuit and District Courts, etc., and the other proposals for better handling of constitutional cases, etc.

In opposition to the proposal for re-making the Circuit, District and other Courts, it is urged that in principle and effects such an enactment would be almost as objectionable as the adoption of the proposal as to the Supreme Court. The Association's referendum resulted in a vote of nearly three to one in opposition to the proposal as to the lower Courts. In every State, the members of the Association voted against it. Non-members voted against it in every State except Mississippi, and in Mississippi the total vote of its lawyers was against it.

As to the other proposals (Questions Two to Five on the Association's ballot), the aggregate vote favored each of them, but the lawyers of many States voted against some of them.

Judge John C. Knox, Senior District Judge of the United States District Court for the Southern District of New York, one of the finest of "liberal" judges, told the Senate Committee:

> "Passing now to a feature of the proposed bill that seems not to have been particularly stressed in the hearings had before your Committee and which, in my opinion, is almost as objectionable as that having to do with the Supreme Court, I call attention to provisions of the act dealing with the assignment of judges from one circuit or district to another. If the new circuit and district judges, who come to power under the plan of the President, are to be selected because of their young blood and forward looking ideas, the bill now under consideration exhibits a consistency of purpose that is of sinister aspect to every man who, upon principle, is opposed to the use of stacked decks of cards.
>
> "Under the terms of Section 2 (a) of the pending bill, the only circuit and district judges whom the Chief Justice can assign to sit within circuits and districts other than their own are those who are 'hereafter appointed.' . The effect of these statutes is that a judge selected pursuant to their authority may be designated to discharge a specific judicial duty. See Johnson v. Manhattan Ry. Co., 289 U. S. 479. As a result of these laws and the one you are now considering, if it shall be enacted, a shocking situation can be created. . . So far as the Southern District of New York is concerned, I desire that it should never for any purpose whatsoever be beleaguered by a flying squadron of judges. . ."

Beyond a doubt, there is a need that members of the public, including lawyers, should make known to the members of the Senate and House their views for or against the proposal as to the Circuit and District Courts, and for or against the proposals embodied in Questions Two to Five of the Association referendum.

(d) *A constitutional amendment for compulsory retirement of members of the Court at seventy-five years of age, with not more than two Justices to be retired for age in any one year, etc.*

Such a proposal is pending, and has been strongly supported by witnesses at the hearings. In support of such an amendment, it is urged that it recognizes the widespread feeling that the Court should not be radically changed without giving the people a chance to vote on the change; that it enables the people to decide whether they wish to compel the retirement of judges at 75 years of age, as many persons believe to be fair and desirable; that such an amendment would not remake the Court suddenly, by compelling the summary retirement of five or six members who had reached the age of 75 years; that such an amendment would be quickly adopted, by the States or by the people; and that such a constitutional amendment, particularly if it fixed the membership of the Court at nine, would put the matter beyond abrupt future change by an Act of Congress for political reasons.

In opposition to such an amendment, it is urged that, throughout the history of the Court and today, its members above 75 years of age have been and are among the most invaluable, and that the Nation ought not to deny itself the mature judgment of elder jurists. This would appear, however, to be a consideration to be weighed by the people in acting upon such an amendment, not a reason why it should not be proposed.

(e) *A constitutional amendment to require a two-thirds' vote in the Supreme Court, to invalidate a law.*

This proposal keeps away from re-making the personnel of the Court, and offers no opportunity to appoint six new Justices. It also conforms to the spirit of the Constitution, in proposing to deal with such a matter through the proposal of an amendment for ratification, rather than through making the change without any vote by the States or by the people within the States.

In support of this alternative, it is urged that many thinking, conservative citizens do not like five-to-four votes on important statutes, and do not like to have one man virtually decide whether a statute is valid or invalid. Many laymen with a realistic view have lately been inclined to regard this change as definitely preferable to enlarging or re-making the Court; they point out that a vote of eight to seven would be no better than five to four. They urge that the actual consequences of requiring a two-third's vote in the Court would not be extensive or subversive; that during the past four years there have been only eleven decisions by a vote of five to four; and that only three of these have been decided adversely to Federal enactments, with about the same ratio in the decisions as to State

laws; and that the acceptance of such an alternative would be preferable to a permanent impairment of the Court.

In opposition to the suggestion, it is urged that although the idea that more than a one-vote margin should be required may have a good deal of practical appeal, the sponsors of the proposal may not have thought it through. Each member of the Court decides and votes on his individual oath; the proposal does not do away with one-vote margins, but changes their effect. It is urged that the proposal involves a substantial concession to minority rule, and does not really get away from the effects of one man's vote either way in the Court, but introduces a new and undesirable complication, in that a statute condemned as invalid by a majority of the Court might still be valid. With a Court of nine and a five-to-four decision against a statute, under a two-thirds' rule, the "one-man" power of each member of the minority of four would exist as now, except that he could prevent the invalidation of the law by remaining one of a minority of four or validate it by becoming one of a majority of five. With a Court of fifteen members and a two-thirds' rule, nine Justices (all of the present Court) might hold the statute invalid, but it would still be valid if each of six new Justices voted to sustain the law. Each Justice who remained with the minority would thereby defeat the views of nine Justices.

(f) *A constitutional amendment to the effect that a decision of the Supreme Court invalidating an Act of Congress may be overridden by a three-fourths or two-thirds vote of each House of the next Congress subsequently elected; provided that such a provision shall not apply to specified parts of the Constitution and Amendments, notably the Bill of Rights.*

In behalf of such an adaptation of "the Madison plan" in the Constitutional Convention of 1787, it is urged that it is essentially conservative, in that it enables invalidated legislation to be reinstated in a deliberate manner, without taking down the bars and opening the doors to all enactments in the same field, as would be the effect of validation through a constitutional amendment in generalized terms. It is urged that such a moderate "safety-valve" would obviate the pressure for re-making the Court.

In opposition to such a procedure, it is urged that it is unsound in principle, in that it would enable the legislative branch of government to override the judicial branch and in effect to amend the Constitution; that the Constitution should be amended only by the vote of the States or the people, and only in general terms embodying a definite rule or principle, rather than in relation to a particular statute; and that such a method of re-validating a particular statute by vote of the Congress would deprive constitutional limitations of virtually all their efficacy.

(g) *A constitutional amendment defining the changes which it is deemed desirable to make in the existing divisions of powers between the Federal and State Governments; e.g., a broadening of the definition of interstate commerce.*

By some it has been suggested that the traditional American method would be to amend the Constitution rather than to amend the Court so that the Court will change the Constitution without the action of the States. Such a course would enable the people to see just what changes it is sought to make in the fundamental law of the land and in just what particulars it is proposed to abridge further the powers reserved to the States or the people.

In opposition to such a method, it is urged that its accomplishment would take too much time, would not enable the present appointment of six new Justices, and might precipitate more definite and sweeping changes in constitutional provisions than it is necessary or wise to make at this time.

In summarizing these seven pending suggestions of alternatives and the arguments urged for and against them, I have not excluded other possibilities, and have not undertaken to indicate my own views upon any of them, much less any views which are attributable to the Association or to anyone in it. Still less have I meant to indicate whether or not any of these alternatives will or should be found to be acceptable, to the public or to the profession of law. My purpose has been only to aid and advance the pending discussions, by bringing to the attention of members and non-members some of the specific alternatives on which they ought to form and express their opinions. If on these great issues as to the Courts, both sides should trust the people and should formulate their proposals in such a way that the people in the various States shall have the final and direct decision, then the first step ought to be the development of an informed public opinion upon all phases of the pending issues, and not merely upon the proposals originally submitted.

NEW SERVICE TO MEMBERS

As part of its program for increased service the American Bar Association has made arrangements to furnish to its members copies of Opinions of the Supreme Court, at a cost of $1.00 for each opinion. Copies of opinions will be sent by air mail within twenty-four hours after the opinion is handed down, which means that they should be received anywhere in the United States on the second day. Requests for opinions may be made prior to the time the decision is announced. All requests should be addressed to the American Bar Association, 1152 National Press Building, Washington, D. C., and should be accompanied by a check payable to the order of the Association for $1.00 for each opinion requested. If it is desired that the opinion be sent special delivery, 10c should be added to the remittance.

QUESTION ONE

Increase in the Number of Judges of the Federal Courts

Should the Congress enact the bill recommended by The President of the United States on February 5, 1937, which would empower the President, when any judge of the United States, appointed to hold his office during good behavior, has heretofore or hereafter attained the age of seventy years after at least ten years of service, and within six months thereafter has neither resigned nor retired, to nominate, and with the consent of the Senate to appoint, one additional judge for such Court, provided that this increase in the number of judges so appointed shall not result in more than fifteen members of the Supreme Court of the United States, or more than two additional judges for a Circuit Court of Appeals or other specified Court, and otherwise as fully set out in the bill, the text of which is herewith printed?

a. With respect to the Supreme Court of the United States

b. With respect to the United States Circuit Courts of Appeals, District Courts and other Federal Courts

	Non-Members		Members		Total Members and Non-Members		Non-Members		Members		Total Members and Non-Members	
	Yes	No	Yes	No	Yes	No	Yes	No	Yes	No	Yes	No
Alabama	144	308	17	127	161	435	165	281	28	116	193	397
Arizona	48	111	16	99	64	210	53	106	27	87	80	193
Arkansas	149	215	27	110	176	325	164	199	45	92	209	291
California	758	2,541	209	1,077	967	3,618	941	2,317	321	954	1,262	3,271
Colorado	97	458	24	215	121	673	117	434	36	203	153	637
Connecticut	96	326	30	305	126	631	130	288	50	278	180	566
Delaware	12	36	9	58	21	94	17	30	15	50	32	80
Dist. Columbia	112	476	137	573	249	1,049	152	431	202	497	354	928
Florida	221	432	92	262	313	694	260	383	135	211	395	594
Georgia	221	372	31	185	252	557	250	340	54	160	304	500
Idaho	42	155	10	49	52	204	49	146	14	44	63	190
Illinois	973	3,848	209	1,427	1,182	5,275	1,287	3,481	327	1,288	1,614	4,769
Indiana	275	1,242	46	298	321	1,540	315	1,194	69	272	384	1,466
Iowa	133	919	32	346	165	1,265	166	876	58	320	224	1,196
Kansas	109	605	19	198	128	803	135	572	30	181	165	753
Kentucky	178	527	41	209	219	736	195	496	58	186	253	682
Louisiana	122	326	37	217	159	543	159	286	71	182	230	468
Maine	35	239	7	103	42	342	45	226	17	91	62	317
Maryland	159	638	37	250	196	888	214	573	66	209	280	782
Massachusetts	229	1,485	73	728	302	2,213	322	1,366	133	647	455	2,013
Michigan	350	1,398	64	469	414	1,867	454	1,276	103	423	557	1,699
Minnesota	195	913	70	428	265	1,341	256	837	111	379	367	1,216
Mississippi	160	173	30	98	190	271	169	160	37	91	206	251
Missouri	374	1,392	115	648	489	2,040	441	1,310	167	594	608	1,904
Montana	61	204	7	50	68	254	72	187	11	44	83	231
Nebraska	154	726	15	235	169	961	188	687	23	224	211	911
Nevada	18	35	13	68	31	103	22	31	24	57	46	88
New Hampshire	9	96	11	75	20	171	21	82	19	64	40	146
New Jersey	465	1,096	98	488	563	1,584	586	957	142	435	728	1,392
New Mexico	14	82	9	43	23	125	19	77	14	38	33	115
New York	2,135	6,119	338	2,196	2,473	8,315	2,639	5,522	511	1,989	3,150	7,511

	Non-Members		Members		Total Members and Non-Members		Non-Members		Members		Total Members and Non-Members	
	Yes	No	Yes	No	Yes	No	Yes	No	Yes	No	Yes	No
North Carolina	242	425	28	147	270	572	270	389	46	127	316	516
North Dakota	44	198	7	45	51	243	50	189	11	39	61	228
Ohio	660	2,831	81	803	741	3,634	775	2,688	134	743	909	3,431
Oklahoma	339	788	59	279	398	1,067	370	743	88	240	458	983
Oregon	100	515	13	157	113	672	120	487	26	139	146	626
Pennsylvania	624	2,273	126	909	750	3,182	769	2,098	219	800	988	2,898
Rhode Island	23	168	11	120	34	288	42	146	24	106	66	252
South Carolina	87	139	20	97	107	236	93	132	28	89	121	221
South Dakota	54	266	6	87	60	353	61	258	15	78	76	336
Tennessee	192	484	36	149	228	633	225	438	51	131	276	569
Texas	611	1,590	93	442	704	2,032	749	1,430	148	385	897	1,815
Utah	27	168	19	113	46	281	31	163	24	108	55	271
Vermont	9	94	5	76	14	170	14	89	7	71	21	160
Virginia	197	577	57	254	254	831	242	528	87	224	329	752
Washington	175	812	30	244	205	1,056	243	731	61	212	304	943
West Virginia	80	381	31	180	111	561	98	358	40	165	138	523
Wisconsin	245	741	56	349	301	1,090	312	665	105	297	417	962
Wyoming	13	78	7	32	20	110	18	72	9	29	27	101
*Foreign	—	—	—	1	—	1	—	—	—	1	—	1
*Territorial Group	—	—	5	14	5	14	—	—	7	11	7	11
Total	11,770	40,021	2,563	16,132	14,333	56,153	14,485	36,755	4,048	14,401	18,533	51,156
Ballots not accompanied by signature slips	205	385	90	279	295	664	232	350	125	236	357	586
Ballots received after polls closed	37	129	32	138	69	267	40	124	43	124	83	248

*Ballots were not sent to non-members outside the continental United States.

QUESTION TWO

As to Assignments of Circuit and District Judges

	Non-Members		Members		Total Members and Non-Members	
	Yes	No	Yes	No	Yes	No
Alabama	234	136	87	55	321	191
Arizona	97	59	61	53	158	112
Arkansas	211	148	95	43	306	191
California	2,189	1,024	891	372	3,080	1,396
Colorado	268	274	143	89	411	363
Connecticut	286	129	224	100	510	229
Delaware	30	16	40	25	70	41
Dist. Columbia	317	261	484	214	801	475

QUESTION THREE

As to Creating the Office of Proctor

	Non-Members		Members		Total Members and Non-Members	
	Yes	No	Yes	No	Yes	No
Alabama	300	144	80	59	380	203
Arizona	92	65	60	52	152	117
Arkansas	212	142	82	51	294	193
California	2,179	997	855	390	3,034	1,387
Colorado	259	273	117	118	376	391
Connecticut	278	137	207	111	485	248
Delaware	37	9	36	29	73	38
Dist. Columbia	330	241	465	222	795	463

	Non-Members		Members		Total Members and Non-Members		Non-Members		Members		Total Members and Non-Members	
	Yes	No	Yes	No	Yes	No	Yes	No	Yes	No	Yes	No
Florida	426	213	230	118	656	331	397	229	206	140	603	369
Georgia	324	266	126	88	450	354	345	239	114	96	469	335
Idaho	99	92	39	19	138	111	91	95	34	24	125	119
Illinois	2,659	2,075	972	622	3,631	2,697	2,580	2,104	905	673	3,485	2,777
Indiana	628	868	197	141	825	1,009	599	885	174	156	773	1,041
Iowa	490	541	228	149	718	690	411	615	179	191	590	806
Kansas	326	373	110	103	436	476	302	391	89	120	391	511
Kentucky	331	349	136	107	467	456	335	339	129	107	464	446
Louisiana	297	145	177	71	474	216	301	138	156	97	457	235
Maine	107	161	51	51	158	212	101	165	45	59	146	224
Maryland	443	340	152	123	595	463	441	338	145	127	586	465
Massachusetts	905	728	486	265	1,391	993	932	681	467	279	1,399	960
Michigan	1,053	660	331	195	1,384	855	1,057	646	348	171	1,405	817
Minnesota	603	482	274	214	877	696	641	426	295	190	936	616
Mississippi	224	105	73	54	297	159	212	115	64	61	276	176
Missouri	799	946	450	309	1,249	1,255	793	927	428	327	1,221	1,254
Montana	161	90	40	17	201	107	145	98	32	24	177	122
Nebraska	427	440	126	117	553	557	408	444	104	139	512	583
Nevada	34	17	55	25	89	42	32	20	56	23	88	43
New Hampshire	49	48	57	27	106	75	46	50	54	29	100	79
New Jersey	1,048	486	409	167	1,457	653	1,006	513	382	192	1,388	705
New Mexico	50	44	36	16	86	60	50	43	33	19	83	62
New York	4,628	2,458	1,578	891	6,206	3,349	5,195	2,803	1,427	1,039	6,622	3,842
North Carolina	393	266	113	58	506	324	406	237	108	62	514	299
North Dakota	117	120	24	28	141	148	127	112	24	27	151	139
Ohio	1,969	1,462	556	316	2,525	1,778	1,951	1,447	495	358	2,446	1,805
Oklahoma	652	457	197	139	849	596	616	480	192	142	808	622
Oregon	320	283	110	54	430	337	268	316	78	84	346	400
Pennsylvania	1,585	1,266	560	453	2,145	1,719	1,673	1,146	566	439	2,239	1,585
Rhode Island	122	66	103	25	225	91	127	58	90	38	217	96
South Carolina	137	87	67	50	204	137	140	79	62	54	202	133
South Dakota	159	157	42	48	201	205	154	162	44	46	198	208
Tennessee	355	302	108	77	463	379	356	297	96	82	452	379
Texas	1,401	775	334	195	1,735	970	1,357	799	338	187	1,695	986
Utah	93	99	75	54	168	153	89	97	71	55	160	152
Vermont	44	55	43	34	87	89	52	44	38	38	90	82
Virginia	467	293	180	132	647	425	458	302	183	128	641	430
Washington	619	346	191	83	810	429	549	406	163	102	712	508
West Virginia	205	238	104	100	309	338	210	235	103	99	313	334
Wisconsin	596	369	265	126	861	495	608	347	258	133	866	480
Wyoming	43	43	20	18	63	61	35	51	19	18	54	69

	Non-Members		Members		Total Members and Non-Members		Non-Members		Members		Total Members and Non-Members	
	Yes	No	Yes	No	Yes	No	Yes	No	Yes	No	Yes	No
*Foreign	—	—	1	—	1	—	—	—	—	1	—	1
*Territorial Group	—	—	11	7	11	7	—	—	11	8	11	8
Total	29,020	20,658	11,462	6,837	40,482	27,495	29,283	20,927	10,707	7,414	39,990	28,341
Ballots not accompanied by signature slips	350	227	241	116	591	343	335	231	204	146	539	377
Ballots received after polls closed	108	57	110	51	218	108	93	67	111	48	204	115

*Ballots were not sent to non-members outside the continental United States.

QUESTION FOUR

As to Right of Intervention by Attorney-General

QUESTION FIVE

Right of Direct Appeal by Attorney-General

	Non-Members		Members		Total Members and Non-Members		Non-Members		Members		Total Members and Non-Members	
	Yes	No	Yes	No	Yes	No	Yes	No	Yes	No	Yes	No
Alabama	309	138	93	48	402	186	326	124	95	46	421	170
Arizona	93	66	61	54	154	120	102	54	66	49	168	103
Arkansas	230	131	78	60	308	191	243	117	100	38	343	155
California	2,022	1,198	677	583	2,699	1,781	2,089	1,128	744	516	2,833	1,644
Colorado	290	251	121	114	411	365	285	253	125	107	410	360
Connecticut	277	137	186	146	463	283	297	118	199	128	496	246
Delaware	33	13	42	23	75	36	36	10	46	20	82	30
Dist. Columbia	327	246	400	289	727	535	349	228	440	249	789	477
Florida	450	188	201	144	651	332	457	183	233	111	690	294
Georgia	381	205	116	95	497	300	392	195	129	80	521	275
Idaho	96	96	27	32	123	128	96	97	32	27	128	124
Illinois	2,851	1,870	883	703	3,734	2,573	2,932	1,779	918	666	3,850	2,445
Indiana	793	706	195	142	988	848	812	690	212	125	1,024	815
Iowa	536	499	199	172	735	671	545	493	195	179	740	672
Kansas	331	369	90	121	421	490	371	328	107	104	478	432
Kentucky	408	281	152	86	560	367	422	263	165	76	587	339
Louisiana	290	151	141	108	431	259	308	133	175	77	483	210
Maine	111	154	48	58	159	212	121	148	52	55	173	203
Maryland	482	294	161	113	643	407	536	242	171	101	707	343
Massachusetts	982	658	473	283	1,455	941	1,030	615	488	270	1,588	885
Michigan	1,124	594	329	195	1,453	789	1,126	590	337	189	1,463	779
Minnesota	707	377	305	179	1,012	556	712	361	301	180	1,013	541
Mississippi	175	153	42	85	217	238	217	111	63	64	280	175

	Non-Members		Members		Total Members and Non-Members		Non-Members		Members		Total Members and Non-Members	
	Yes	No	Yes	No	Yes	No	Yes	No	Yes	No	Yes	No
Missouri	899	835	414	344	1,313	1,179	962	774	473	284	1,435	1,058
Montana	144	105	30	27	174	132	160	91	34	23	194	114
Nebraska	493	370	132	111	625	481	541	326	146	99	687	425
Nevada	31	19	48	35	79	54	31	19	51	32	82	51
New Hampshire	57	41	50	33	117	74	59	40	51	32	110	72
New Jersey	1,087	442	362	210	1,449	652	1,125	399	392	182	1,517	581
New Mexico	49	44	24	27	73	71	56	38	28	24	84	62
New York	5,804	2,274	1,631	849	7,435	3,123	5,951	2,130	1,683	799	7,634	2,929
North Carolina	428	224	113	57	541	381	441	214	114	57	555	271
North Dakota	140	100	26	25	166	125	142	98	32	19	174	117
Ohio	2,053	1,363	475	395	2,528	1,758	2,095	1,329	478	381	2,573	1,710
Oklahoma	677	434	176	159	853	593	699	405	188	148	887	553
Oregon	297	294	94	66	391	360	319	273	105	58	424	331
Pennsylvania	1,894	956	643	363	2,537	1,319	1,919	927	638	372	2,557	1,299
Rhode Island	119	68	96	33	215	101	126	61	86	45	212	106
South Carolina	153	71	68	49	221	120	161	62	80	36	241	98
South Dakota	179	136	46	43	225	179	177	138	52	39	229	177
Tennessee	424	236	112	67	536	303	453	211	129	52	582	263
Texas	1,326	846	293	232	1,619	1,078	1,422	750	344	176	1,766	926
Utah	93	92	49	79	142	171	102	84	69	58	171	142
Vermont	52	46	33	43	85	89	57	43	43	34	100	77
Virginia	474	287	192	117	666	404	516	245	204	106	720	351
Washington	538	425	133	137	671	562	587	372	160	109	747	481
West Virginia	238	213	109	95	347	308	258	191	125	77	383	268
Wisconsin	681	285	236	158	917	443	678	289	263	130	941	419
Wyoming	52	36	21	17	73	53	45	42	23	15	68	57
*Foreign	—	—	—	1	—	1	—	—	1	—	1	—
*Territorial Group	—	—	11	8	11	8	—	—	12	8	12	8
Total	31,680	19,017	10,637	7,613	42,317	26,630	32,886	17,811	11,397	6,852	44,283	24,663
Ballots not accompanied by signature slips	365	205	225	130	590	345	379	192	241	118	620	310
Ballots received after polls closed	102	58	103	58	205	116	104	58	109	54	213	112

*Ballots were not sent to non-members outside the continental United States.

Bill for "Reforming" the Supreme Court

(*Continued from page* 353)

along with theirs as to the constitutional powers of Congress and the limits placed by the Constitution on such powers?

A strange check and balance as so conceived! A check by Congress on the independence of the courts in decision and a balance weighted against the independence of the Court!

The theory as to the purpose of those who framed and ratified the Constitution, that dominates the President's thinking; the fact that his appointees will in the nature of things be men whose minds run along with his; his impatience—though this is a delicate subject it cannot be ignored—with minds that do not run along with his; his tacit bringing into question anew the constitutional legitimacy of the power exercised by the Court to deny acts of Congress effect when in the judgment of the Court the acts transcend the powers granted Congress, and the fact that this theory was foreshadowed by the "horse and buggy" comment, which if recollection serves me, was directed to a *unanimous* decision of the Court as to the constitutionality of the N. I. R. A. by which decision the Court exercised this power; his expressed lack of faith in the practical efficacy of the process of Amendment and impatience at the restraints that the amendatory process imposes,—an impatience not without reason, all combine to arouse uncertainty as to, and fear of, the consequences to our Constitutional order that may follow on the enacting of the bill.

THE COURT A BALANCE WHEEL. DO NOT SHAKE IT FROM ITS GEARINGS

Woodrow Wilson, from whose writings I again quote, said that the courts are the balance wheel of our constitutional system "taking the strain from every direction and seeking to maintain what any unchecked power might destroy. They are at once instruments of the individual against the government, of the government against the individual, of the several members of our political union against one another, and of the several parts of the government in their legal synthesis and adjustment."

My genuine fear is that the pending bill has in it potentialities that threaten to shake the balance wheel from its gearings.

If the bill is enacted, those who oppose its enactment can only pin hope that radical amendment of the Constitution through a process of judicial action short-cutting the constitutional mode of amendment will not result, on the fact that views of men not sobered by judicial responsibility may differ and have differed from the views of the same men when "lifted above all personal interest" and charged with responsibility to act, not as advocates but as arbiters.

In the Virginia Federal Convention George Mason addressing himself to the clause of the Constitution extending the original jurisdiction of the Court to controversies between a state and the citizens of another State, said: "Is not this disgraceful? Is this State to be brought to the bar of justice like a delinquent individual?" John Marshall with vision blurred by his zeal to bring ratification about replied: "I hope no gentleman will think that a State will be called at the bar of a federal court." Marshall later as Chief Justice when charged with responsibility to act not as an advocate but as an arbiter, called Georgia to the bar of the Court.

Woodrow Wilson recalled as an incident "full of instruction" that Chase, when Secretary of the Treasury under Mr. Lincoln, advocated the issue of irredeemable paper currency in relief of the Treasury, and was largely instrumental in inducing Congress to pass the statutes which filled the country with "greenbacks," declaring it to be his opinion that such issues were legal under the powers granted Congress by the Constitution; but that Chase when afterwards Chief Justice of the United States joined with the majority of the court in declaring the legal tender acts unconstitutional.

Woodrow Wilson commented: "The thing might happen with the most conscientious lawyer. It is one thing to have to decide a matter of that kind in connection with important business you are conducting, and it is quite another thing to have it to decide as a judge lifted above all personal interest in the matter and bidden take it upon its merits, not as an advocate but as an arbiter."

How true! Mr. Brandeis, whose sincerity whether at the bar or on the bench no one would question, while at the bar criticized the Miles decision (220 U. S. 373) invalidating a resale price maintenance contract under the Sherman Act; but on the bench Mr. Justice Brandeis voted to support the affirming decision in the later *Boston Store Case* (246 U. S. 8).

Now let us consider some of the suggestions made in support of the bill.

A COURT OF FIFTEEN "OLD MEN"

It is said in support of the bill that "life tenure of judges assured by the Constitution was designed to place the courts beyond temptations or influences which might impair their judgments; it was not intended to create a static judiciary." It is further suggested that a "constant and systematic addition of younger blood will vitalize the courts and better equip them to recognize and apply the essential concepts of justice in the light of the needs and the facts of an ever-changing world."

The bill gives no assurance of "a constant and systematic addition of younger blood." It fixes no maximum age of appointees. It does not relate additional appointments to the age of incumbents alone. It relates such appointments to age and period of service combined which may result in deferring the power of additional appointment beyond an incumbent's attaining the specified age. If the six judges now of both retiring age

and service, elect to continue in office; if six additional judges are appointed, the act becomes inapplicable in the future, and thereafter, as now, death, resignation, and impeachment alone will provide opportunity for the "infusion of new blood." Directed at a court of "nine old men" the pending bill sows seed which may fructify in a court of "fifteen old men." The bill assures a drastic allopathic dose of "new blood in the present." It gives no assurance of "constant and systematic" homeopathic doses of "new blood" as the years pass.

This suggestion in support of the bill attributes to life tenure a judiciary that is static and that fails to "recognize and apply the essential concepts of justice in the light of the needs and the facts of an ever changing world." The attribution may well be questioned.

It was a State court of last resort with judges elected for a comparatively short period of years and holding under a Constitution requiring retirement at seventy, that determined that both State and Federal Constitutions prohibited imposing liability without fault and that denied effect to a Workmen's Compensation Act. It was a State court of last resort constituted in like manner that adjudged an act limiting the consecutive hours of labor of women in industry to violate both State and Federal Constitution and refused the act effect.

Apparently these courts without life tenure, coming from and going to the people through election at comparatively short intervals of years and subject to an age limitation, failed in these instances to "recognize and apply the essential concepts of justice in the light of the needs and facts of an ever changing world."

The Supreme Court, however, with judges appointed and enjoying life tenure strangely enough "recognized and applied essential concepts of justice" and adjudged that the enactment of both these types of statutes was within the competency of a State and did not violate the Federal Constitution. The judges of the State courts rendering these decisions holding Workmen's Compensation Acts and Acts limiting the consecutive hours of work of women unconstitutional, coming as they did into office through election, had in the nature of things "personal experience and contact with modern facts and circumstances under which average men have to work and live."

As indicated at the outset, the power of fixing the number of justices to constitute the Court was left with Congress in order that the number might be according to the needs of the work of the Court. The power was not left with Congress as a means of enabling it to assure that the judgments of the Court should merely mirror and reflect the convictions of the governmental enacting and appointing powers as to what are the "essential concepts of justice"; nor to assure that in such judgments all other convictions as to the essential concepts of justice should be ignored.

Justice is figured with eyes blindfolded symbolizing impartial judgment. The power now considered was not left with Congress to enable it to substitute for this symbolic figure another equipped with blinders holding the eyes of the Court to a single direction and that direction—towards the enacting and appointing powers.

It is said that in some instances the Court has departed from sound principles and engaged in "tortured construction" of the Constitution, and that a substantial minority of the Court have at times been moved to protest.

Admit that the Court has, on occasion, erred. To err is human. The President has claimed for himself and for Congress the privilege of erring, saying in substance: we will proceed in legislation by the process of "trial and error."

Surely, the two divisions of the government so claiming the privilege of moving on the basis of trial and error are not justified in seeking to disestablish and reconstitute the third on the ground that it has on occasion erred.

UNCERTAINTY

The President says: "I defy any one to read the opinions concerning the A. A. A., the Railroad Retirement Act, the National Recovery Act, the Guffey Coal and tell us exactly what, if anything, we can do . . . in this session of the Congress with any reasonable certainty that what we do will not be nullified as unconstitutional." It should be noticed that these words are not only directed at opinions in cases in which the Court divided but also at opinions in which the Court was unanimous. If the challenge is based on a charge of lack of clarity in the opinions—a claimed want of reasonable facility in the members of the court as now constituted to use words to express their conclusions clearly, I see nothing in the bill that assures that the new appointees will be more facile in expression. Will you forgive me if I suggest that the claimed difficulty which leads to the challenge may in part be owing to a like lack of facility in the legislative draftsmen of the acts before the Court. Reading these acts I, too, because of their generality and vagueness and their wide sweep, have been left in doubt as to precisely where Congress intended to go and how.

If the challenge is based on the ground that the opinions are confined to disposing of the specific issues which were before the Court in the several cases—on the ground that the Court has not in its opinions gone beyond the issues and has not used its opinions as vehicles for general instruction of Congress as to the scope and limitations of the constitutional powers of Congress—then it misconceives the judicial function. The decision in the *Dred Scott Case,* in which the Court proceeded beyond the issue to instructing Congress and the people as to the constitutional powers of Congress in general, and the consequences that followed, luridly illustrates the perils of such judicial action.

If the challenge is based on the division of opinion in the Court in some of these cases, it ought to be noted

that unanimity in opinion on the bench can no more be reasonably expected upon all questions at all times than it can reasonably be expected among legislators even though the issue on which opinion is taken be properly confined to one of constitutional power. Questions of constitutional power are not subject to mechanical determination by the application of a slide-rule.

AMENDMENT—A PROCESS OF APPEAL TO THE PEOPLE

It is urged in support of the bill that the decisions of the Court have created a situation in which "we must find a way to take an appeal from the Supreme Court to the Constitution itself."

What need to find "a way"?

A way was found and provided in the Constitution—the way of appeal to the people through the process of amendment of the Constitution.

The way that the pending bill would open leads away from the people. It takes us in another direction. Why abandon the provided way?

Why substitute a way that diverts the appeal and its determination from the people, and sends it to a Court specially arranged by act of the Congress—party to the appeal and whose acts are involved in the issue—to assure a result on appeal favorable to the Congressional action?

The Constitutional way of appeal to the people was taken to overcome the decision of the Court that permitted a State to be arraigned at the bar of the Court at the suit of a citizen of another State. The people rendered judgment on that appeal in ratifying the Eleventh Amendment. The same way of appeal to the people was taken to overcome the decision of the Court in the *Income Tax Cases*. In the Sixteenth Amendment the people rendered judgment on that appeal.

SUGGESTED ALTERNATIVES

Grave social and economic problems admittedly confront us. It is not my suggestion that Congress, if the plan embodied in this bill is not put into effect because of the dangers that inhere in it, stand idly by and return to the policy of refraining from affirmative action which had characterized the past.

If it is the conviction of Congress that the present situation in the Court as now constituted of members a majority of whom are of advanced years is an ill, why not proceed in Constitutional mode to guard at least against the recurrence of this situation in the future by submitting an Amendment limiting the holding of judicial office by future appointees to attainment of the age of 70 or 75 years? I would support ratification of such an amendment. Why not submit an Amendment definitely prescribing and limiting the number of judges of the Court at ten or even at eleven if conviction exists in Congress that the Court is overburdened, though the unanimous testimony of the Court is to the contrary?

I would support ratification of such an Amendment for it would end all possibility of recurrence in the future of the threat to constitutional order which the present bill involves. Why not, if there is conviction that change in the existing situation in the Court is now demanded in the interest of the public welfare, submit the essential substance of the present bill in the form of an Amendment, or why not submit an Amendment which will effect correction of the existing situation gradually over a reasonable period of years?

If I have no enthusiasm for submitting the last two suggestions it is because both would at once affect Mr. Justice Brandeis, one, who as jurist and as man, has won a high place in the affection and esteem of the people and because of my perhaps unwarranted conviction that an amendment having that personal effect would be rejected by the people. Emotion plays an important part in human action. I look back to the Virginia convention of 1829 where the principle of retiring judges at the age of seventy years was proposed and where it appeared that Wythe, Pendleton, and Roane, jurists highly esteemed and beloved, had served on the supreme court of that State with distinction long after they would have reached the proposed age limit. The proposal was rejected.

There comes to mind, too, experience in New York. The first constitution of that State required the retirement of judges at the age of sixty-five years. When such constitutional age limit compelled Chancellor Kent to retire before he had reached the maximum of mental power, an Amendment to the constitution of the State advanced the age of retirement to seventy years. Candor compels me to say that as now inclined I would oppose ratification of such Amendments if *now* submitted.

It is urged that the process of Amendment is unnecessarily cumbersome. There is basis for this complaint. If the limitations now imposed upon Amendment exceed, under the conditions of this day, the restraints needed to assure due deliberation in consideration and maturity in resolution in changing the fundamental law, why not submit an Amendment to the people clarifying and simplifying the procedure in Amendment?

Why not, if the period of time that now passes between enacting legislation by Congress and final judicial determination as to its constitutionality is so great as to bring uncertainty and confusion that tends to paralyze the processes of government, submit an Amendment that will authorize Declaratory Opinions by the Court, at least with respect to some types of legislation, on request of the President, whose constitutional duty it is to enforce the law?

Why not establish an agency of Congress for impartial and disinterested study of the threatening problems to which the President has called attention in burning words; an agency for bringing together the facts of present-day life out of which these problems arise; an agency to explore the subject of most effective remedies and the possibility of putting such remedies

into operation under the Constitution as interpreted by the Court.

The results of the factual studies by such an agency reported to Congress and made the basis of its legislation would, if presented to the Court on argument in support of such legislation, furnish the Court with the fact-background against, and in the light of which, Congress acted.

Studies by such a Congressional agency, may, and in my judgment will, show the need of amending the Constitution. If they do, they will at the same time furnish the fact-data that should be taken into account in framing and submitting Amendments.

I regret that the offering of this bill has delayed, and will delay Congressional consideration of legislative action relating to pressing problems and to the means of meeting them within the Constitution as it now stands, or through submission of Amendments if the Constitution as it now stands does not admit of the legislation that is determined to be required in the general welfare.

I close with the prayer written by Jonas Phillips in 1787: "May the almighty God of our fathers . . . endow this Noble Assembly with wisdom, judgment and unanimity in their councils, and may they have the satisfaction to see that their present toil and labor for the welfare of the United States may be approved of through all the world and *in particular by the United States. . . .*"

A Reply

(*Continued from page* 363)

was that there were many people at the time who knew that quinine was a better remedy for fever than bleeding. They did not think that the fundamental principles of medicine required that it be banned. The witnesses who have testified in opposition to the President's proposal have practically all been sure that the majority of the Supreme Court has been misinterpreting the Constitution. There were many in the middle ages who felt the same way about the decree on quinine. But, they said, in spite of this, now is the time for all good men and true to come to the aid of the University of Paris. It is much better, they solemnly intoned, that we undergo any amount of suffering and confusion, even that thousands die, rather than damage the prestige of that great medieval institution. Where would the learning of the middle ages be if it were not for the University of Paris? Therefore, if we are to have any principles left, we must not damage the authority of that great institution by any common sense methods. Medicine is going ahead too fast anyhow, they said, and we have got to watch it in order to keep it back. In this particular effort their success was overwhelming.

It is a long, long time since this incident in the history of medicine occurred. We know now, however, that had more liberal-minded medical authorities been

put on its faculty, it would not have lost in prestige, but gained. We know that the institutions of the middle ages would not have fallen. We know that institutions have sunk and not risen in authority when composed of men of stubborn and mutually irreconcilable views. We know that institutions become in danger when they do not keep up to date and that no great university, or court, has ever been destroyed by bringing into it men who were abreast of the times.

It is odd that today we can understand the middle ages so much better than the times in which we live.

"The Wonderland of Bureaucracy"

Continuing Importance of Proposal for Administrative Court—Association Committee to Present Draft of Bill in Kansas City—Proposed Plans for Reorganization of Federal Service

THE late James M. Beck, formerly Solicitor General of the United States, and Col. O. R. McGuire, now chairman of the Special Committee on Administrative Law of this Association, wrote in 1932 under the title of *Our Wonderland of Bureaucracy* the first comprehensive analysis of the administrative machinery of the Federal government as it actually exists and functions from day to day. This book appeared shortly after Lord Hewart's "The New Despotism" which is a description of the administrative service in England.

There had been sporadic attempts prior to that time to reorganize the Federal administrative service—the most complete of such prior studies being made in 1912 by President Taft's *Commission on Economy and Efficiency*. However, little was accomplished, either in reduction of personnel, expenses, or simplification of administrative processes. Also, there grew apace the practice of providing in the Federal statutes that the decision by some administrative officer of various controversies with the United States government should be final and conclusive.

Somewhat belatedly, the American Bar Association tion created in 1933 a Special Committee on Administrative Law to make a study of the situation and to recommend to the Association some solution of the problem. That Committee has filed with the Association in 1933, 1934 and in 1936, three exhaustive reports which will be found in the annual proceedings of this Association. Also, in the meanwhile the present Chairman of the Committee has made many addresses on the subject and reprints of such addresses, as well as reprints from a number of law journals have been mailed to the members of the House of Delegates and to teachers of administrative law in the various law schools. The Committee has vigorously continued its work on the program and intends to present at the Kansas City Convention in September a draft of bill to bring about some order in the administrative processes and to provide an independent review of the administrative decisions of concrete cases.

Meanwhile, President Roosevelt has transmitted to the Congress for consideration a proposed reorganization of the administrative services as recommended by Messrs. Brownlow, Gulick, and Merriam, who have spent a number of years in the study of municipal governments. This report was referred to a joint Senate and House Committee for study but to date the studies of this joint committee have been behind closed doors with no public hearings thereon. Senator Byrd of Virginia, who did an excellent job of reorganizing the Virginia State Government when he was Governor of that State, secured the creation of a separate Senate Committee on Reorganization of the Federal government and enlisted the facilities of the Brookings Institution, a fact-finding and non-political organization, to assist in the studies of his Committee.

Copies of some of the more important studies made by the Brookings Institution have been obtained pursuant to a resolution adopted in January at the meeting of the House of Delegates. These copies have been forwarded to the officers and members of the House of Delegates and further copies will be obtained and mailed to them during the coming weeks. If any member of the American Bar Association has not received a copy of both the Brownlow and Brookings Institution reports and desires same, they may be obtained by writing to his Senator or Congressman.

These reports to Congress do not go so far as recommending a remedy for lack of independent review of administrative decisions which is now the primary responsibility of the Special Committee on Administrative Law. Such reports are primarily concerned with the existing administrative activities of the Federal government and methods of consolidation and simplification with possible reduction in their cost of maintenance.

However, the reports are of importance to the American lawyer who may be called upon to present the cases of his clients to administrative tribunals. Also, the reports are likewise of importance to an understanding of the work of the Committee on Administrative Law, particularly its recommendations when presented to the Kansas City Convention of the American Bar Association.

Junior Bar Conference's View of Supreme Court Proposal

(*Continued from page* 337)

by the people forbids the Court even to defend itself against attack. You have it in your power to snuff out its independence as one puts out a light at the end of the day; you have it in your power to destroy the confidence, respect and loyalty which the people have for the Court, and which has been its dearest heritage for a century and a half. But if you exercise the power on this occasion, the effects of what you do may continue through the years. You may see the other beacons of liberty snuffed out; you may see all the powers of sovereignty gathered in one hand and a free people no longer free. You may see what other men in other lands have seen when revered institutions have been weakened.

Yours is an historic choice. May it be one that my generation and future generations will approve.

NOTICE BY THE BOARD OF ELECTIONS

NOTICE is hereby given that vacancies in the office of State Delegates existed on February 15, 1937, in Arkansas, Illinois, Maryland, West Virginia, and the territorial group. Nominating petitions received on or before April 29 are, in accordance with the requirements of the Constitution, printed in this issue of the American Bar Association Journal. Ballots containing the names of the nominees will be sent prior to May 15 to all members of the Association in the jurisdictions in which the elections are to be held. All ballots, in accordance with the requirements of the Constitution, will provide space for a personal choice. The polls will close for elections in Arkansas, Illinois, Maryland, and West Virginia on June 15, 1937, and for the territorial group on July 20, 1937.

One nominating petition was disqualified because it did not contain the names of twenty-five members in good standing. Only the names of members in good standing appear in connection with the following petitions:

BOARD OF ELECTIONS

By EDWARD T. FAIRCHILD, Chairman.

PETITION FOR NOMINATION FOR THE OFFICE OF STATE DELEGATE

TO THE BOARD OF ELECTIONS OF THE AMERICAN BAR ASSOCIATION:

The undersigned member or members of the American Bar Association residing in Arkansas hereby nominate *Mr. A. W. Dobyns* of Little Rock, Arkansas, for the office of State Delegate from Arkansas.

This 22nd day of February, 1937.

Edward B. Downie, Shields M. Goodwin, S. M. Casey, Chas. E. Sullenger, George D. Hester, John E. Coates, Jr., W. S. Mitchell, Jr., W. R. Donham, S. Hubert Mayes, Louis Tarlowski, Ozero C. Brewer, Geo. K. Cracraft, Harry P. Daily, John P. Woods, Chas. A. Walls, Joseph M. Hill, Henry L. Fitzhugh, John Brizzolara, E. L. Westbrooke, Ernest Neill, James D. Head, Adrian Williamson, Lamar Williamson, W. F. Coleman, N. J. Gantt, Jr., E. H. Wootton, T. K. Martin, J. S. Waterman, O. A. Graves, Albert Graves, Thos. C. Trimble, L. B. Burrow, J. Merrick Moore, W. G. Riddick, S. H. Mann, Burk Mann, Edward L. Wright, Harvey T. Harrison, Thomas H. Buzbee.

TO THE BOARD OF ELECTIONS OF THE AMERICAN BAR ASSOCIATION:

We, the undersigned members in good standing of the American Bar Association, accredited to the State of Illinois, hereby nominate *Donald B. Hatmaker* as a candidate for the office of State Delegate of the American Bar Association for and from said State, and petition the Board of Elections of the Association, in accordance with Sec. 5 of Article V of the Constitution, to place the name of such nominee on the printed ballots for the election of said State Delegate to be held in the year 1937.

Albert J. Meserow, W. Clyde Jones, Philip R. Davis, Lambert Kaspers, Joseph T. Harrington, Erwin Seago, Stuart B. Bradley, James A. Velde, Mitchell Dawson, Bertha L. MacGregor, Harold P. O'Connell, Elmer E. Abrahamson, Glenn G. Paxton, Thomas L. Owens, Robert Mitten, W. Edgar Sampson, Sigmund W. David, Alice Greenacre, James P. Carey, Jr., James P. Economos, Donald W. Nofri, Harold T. Halfpenny, Richard C. Bleloch, Lawrence C. Mills, David J. Shipman, Edw. E. Barthell, Jr., Albert E. Jenner, Jr., Alex Elson, George W. Gale, Robert Friedlander, John W. Ogren, Paul M. Mitchell.

TO THE BOARD OF ELECTIONS OF THE AMERICAN BAR ASSOCIATION:

A vacancy now exists in the office of State Delegate from the State of West Virginia in the House of Delegates of the American Bar Association. The undersigned nominate *Honorable Frank C. Haymond,* of Fairmont, West Virginia, for such office. This nominating petition, although signed in parts, shall be taken as a whole in conformity with the Constitution.

Respectfully,

Herman Bennett, R. G. Kelly, L. Ebersole Gaines, Thomas B. Jackson, W. T. O'Farrell, W. Chapman Revercomb, Berkley Minor, Jr., J. H. McClintic, Lon H. Kelly, Valentine L. Black, Patrick D. Koontz, W. Elliott Nefflen, Arthur B. Koontz, W. W. Goldsmith, John C. Morrison, E. W. Knight, Arthur S. Dayton, Fred O. Blue, Stanley C. Morris, John V. Ray, Hawthorne D. Battle, Howard R. Klostermeyer, Jackson D. Altizer, George E. Price, Robert S. Spilman.

TO THE BOARD OF ELECTIONS OF THE AMERICAN BAR ASSOCIATION:

We, the undersigned, hereby nominate *Charles Ruzicka* of Baltimore, Maryland, as a candidate for the office of "State Delegate for the State of Maryland."

Clarence W. Miles, George S. Newcomer, R. Dorsey Watkins, McKenney W. Egerton, W. Thomas Kemp., Jr., John W. Avirett, 2nd, Harry O. Levin, Max Sokol, F. Stanley Porter, F. H. Fanseen, R. E. Lee Marshall, William H. Marshall, G. C. A. Anderson, Herbert M. Brune, John G. Schilpp, John T. Tucker, W. Frank Every, J. Purdon Wright, George O. Blome, William C. Rogers, J. A. Dushane Penniman, R. Contee Rose, Wm. C. Schmeisser, F. W. Brune, Addison C. Mullikin, Wm. L. Henderson, Chas. T. LeViness, 3rd, J. Wallace Bryan, Charles F. Stein, Charles F. Stein, Jr., John A. Cochran, H. W. Allers, H. Beale Rollins, Hilary W. Gans, Cornelius P. Mondy, J. Clarke Murphy, Eli Frank, Jr., Robert H. Gerbig, Leon H. A. Pierson, Paul F. Due, Walter C. Mylander, Stephen W. Leitch, Chester A. Albrecht, J. Kemp Bartlett, Jr., John H. Skeen, Edgar A. Poe, Jr., Edgar Allen Poe, J. Kemp Bartlett, Eben J. D. Cross, Jos. Addison, F. Fulton Bramble, Hugh D. Combs, Washington Bowie, John A. Luhn, J. Harry Schisler, Chas. H. McComas.

TO THE BOARD OF ELECTIONS OF THE AMERICAN BAR ASSOCIATION:

We, the undersigned members of the American Bar Association, in good standing, and residents of West Virginia, hereby nominate for State Delegate for and from West Virginia, *Randolph Bias,* of Williamson.

Stanley C. Morris, J. Horner Davis, 2nd, Berkeley Minor, Jr., John V. Ray, Herman Bennett, Arthur B. Hodges, Robert H. C. Kay, Joe L. Silverstein, Melville Stewart, George Richardson, Jr., Paul S. Hudgins, Elbert S. Kemper, Jr., Luther G. Scott, Howell M. Tanner, Bernard McClaugherty, Jr., W. Broughton Johnston, John R. Pendleton, A. W. Reynolds, Thomas H. Scott, A. F. Kingdon, Bernard McClaugherty, Harriet L. French, Mark T. Valentine, R. Paul Holland, Robert Bland, Chas. L. Estep, M. D. Herzbrun, Joseph M. Crockett, Samuel Solins, W. H. Ballard, W. Goodridge Sale, Jr., J. Randolph Tucker, Thornton G. Barry Jr., D. J. F. Strother, E. Gaujot Bias, Wm. B. Hogg, Lant R. Slaven, Wells Goody-

koontz, J. Brooks Lawson, Paul W. Scott, John B. Meek, C. W. Strickling, W. H. Norton, J. R. Marcum, Jackson N. Huddleston, Taylor Vinson, W. K. Cowden, F. A. Macdonald, W. T. Lovins, T. W. Peyton, Geo. S. Wallace, E. L. Hogsett.

TO THE BOARD OF ELECTIONS OF THE AMERICAN BAR ASSOCIATION:

We, the undersigned, members of the American Bar Association and accredited to and residing within the State of Arkansas, nominate *Henry M. Armistead, Sr.*, of Little Rock, Arkansas, as a candidate for the office of State Delegate for and from the State of Arkansas.

Frank Pace, F. G. Bridges, Galbraith Gould, Thos. S. Buzbe, Grover T. Owens, E. L. McHaney, Jr., Richard C. Butler, Willis H. Holmes, John A. Sherrill, H. Howard Cockrill, P. A. Lasley, Al G. Meehan, W. R. Donham, W. R. Roddy, Harry B. Solmson, Jr., Eugene R. Warren, A. L. Barber, Elbert A. Henry, Leon B. Catlett, John W. Newman, A. D. DuLaney, Ashley Cockrill, S. Lasker Ehrman, John M. McFarlane, Graham R. Hall, William Henry Donham, Martin K. Fulk, E. W. Moorhead, C. R. Huie, E. L. Westbrooke, Horace Sloan, Joe Barrett, N. F. Lamb, Arthur L. Adams, J. F. Gautney, Charles Frierson, Charles Frierson, Jr.

TO THE BOARD OF ELECTIONS OF THE AMERICAN BAR ASSOCIATION:

The undersigned, members of the American Bar Association, in good standing, residing in and accredited to the State of Illinois, do hereby nominate *Charles M. Thomson* as a candidate for the office of State Delegate for the State of Illinois, and hereby petition the Board of Elections of The American Bar Association to insert the name of the said *Charles M. Thomson* as a candidate for said office on the printed ballots for election of State Delegate for Illinois, as provided in the Constitution of said Association.

Hayes McKinney, Richard J. Finn, Irwin T. Gilruth, Willard L. King, Henry P. Chandler, Charles Leviton, John J. Sonsteby, Harper E. Osborn, Erwin W. Roemer, Beverly B. Vedder, Sylvanus George Lee, Edward Hersherson, Wm. H. Haight, George Packard, H. C. Lutkin, David Levinson, Leonard M. Rieser, Joseph M. Larimer, Joseph F. Grossman, Herbert M. Lautman, James S. Handy, Williams McKinley, Lawrence C. Mills, Lambert Kaspers, Ning Eley, Oscar C. Miller, Harry C. Kinne, C. P. Denning, Tappan Gregory, Frederick Dickinson and Russell Whitman.

Washington Letter—Social Security Act Being Tested—The Anti-Lynching Bill—Taxability of Stock Dividends—Long and Short Haul Provisions, Etc.

Social Security Act Being Tested

THE constitutionality of Title IX of the Social Security Act, providing compensation during unemployment is soon to be determined in Steward Machine Co. v. Davies, No. 837, which has been argued before the Supreme Court. The act was upheld by the Circuit Court of Appeals for the 5th Circuit, in this case, March 20, 1937.

Title VIII of the act, providing old-age benefits, also will be presented shortly to the Supreme Court. The Circuit Court of Appeals for the First Circuit held it unconstitutional April 14, 1937, in Davis v. Edison Electric Illuminating Co., of Boston. On the same day the First Circuit held Title IX of the act unconstitutional in Davis v. Boston & Maine Railroad, but it is likely the Government will not ask certiorari in this case since it presents the same basic issue as the case already argued from the 5th Circuit as above recounted.

There may arise an incidental question of some interest as to whether employers in the First Circuit may be penalized for delinquency in filing returns during the time within which the highest court in their jurisdiction which has spoken on the subject says this act is unconstitutional. There would be no doubt but that, if the Supreme Court holds both titles of the act constitutional, then they were valid and effective, so far as the tax affixing sections are concerned, throughout the nation from their enactment. But does this justify a penalty on the citizen who chose to abide by the decision of his Circuit Court of Appeals, not knowing that the case ever would be passed upon by a higher court? Is he presumed, subject to a severe penalty, to know the law and to know it more accurately than high and experienced jurists under whom he lives?

The Commissioner of Internal Revenue, having been advised that some employers in New England have expressed the opinion it would not be necessary for them to file returns and pay these taxes, calls attention to the penalties—5% for 30 days delinquency in filing the return; 25% for 120 days delinquency; and, for wilful failure to make a return or pay the tax, a penalty of not more than $10,000 as well as imprisonment—and says, "I have specifically instructed the Collectors in all collection districts to investigate actively all cases of failure to make returns." And the Commissioner says further, "In the event that the Supreme Court upholds these taxes, we will collect the penalties for the failure to make returns and to pay the tax whether or not such failure occurred before or after the date of the Supreme Court decisions."

Anti-Lynching Bill

One of the perennial and persistent bills to punish the crime of lynching has passed the House. This had not happened since 1922 when the measure failed in the Senate. Speaker Bankhead of the House has expressed the belief that, if the measure is brought to a vote in the Senate, it will pass that body. The vote in the House was: yeas 277; nays 119.

The bill declares that any state or political subdivision thereof, wherein a mob kills or injures a person in the custody of a peace officer, has denied to such person the equal protection of its laws and the benefit of due process of law as guaranteed by the Constitution of the United States. An officer who fails, neglects, or refuses to make all diligent efforts to protect his charge, or an officer charged with the duty of apprehending or prosecuting persons com-

miting mob violence would be guilty of a felony and subject to a fine of $5,000 or imprisonment for five years. An officer conspiring with members of a mob to injure a prisoner in his custody would be subject to from five to twenty-five years imprisonment.

Trials of infractions of the act would be held in the states or counties where committed; but the United States District Courts would have jurisdiction to try the cases upon its being made to appear to the court that the state enforcement officers charged with the duty of apprehending, prosecuting, or punishing such offenders had failed, neglected, or refused to perform such duties; or that persons available for jury duty, by reason of bias, probably would enable the accused to escape punishment. The injured person or his personal representatives might recover damages against the county not less than $2,000 or more than $10,000; and if such judgment is not promptlly satisfied might levy upon the property of the county.

Strong and heated arguments were passed back and forth in the House during debate on this bill. Several odd alignments occurred and at times the discussion was quite picturesque. One opponent of the measure challenged the idealism of some of its sponsors with the conclusion that "if the lynching pot is black in the South, the gangsters' kettle in New York is blacker." He illustrated his point with the story of "the Negro boy who was so black that all of his white friends called him 'Midnight.' He was not resentful of the white man's thus referring to his color and black features, but a yellow Negro, thinking to emphasize the distinction between their colors, hollered across the street to him, 'Hello, thar, Midnight,' and the black boy replied, 'Shut up; you is about a quarter to 12 yourself.'" 81 Cong. Rec. 73 (4-15-37) p. 4561.

Taxability of Stock Dividends

The Supreme Court is expected to decide in the not distant future whether those stock dividends which did constitute income to the recipient of them were taxable, in view of the plain provision, in a number of the revenue acts prior to that of 1936, that "A stock dividend shall not be subject to tax." Sec. 115 (f) of 1934 Act and several prior Revenue Acts.

The Government contends that this exemption of stock dividends from the income tax applies only to those dividends which do not constitute income to the stockholder under the Sixteenth Amendment; and that it did not exempt from taxation a preferred stock dividend paid to the holder of the corporation's common stock which therefore resulted in an alteration of his proportionate interest in the company's two classes of stock and hence was income.

Similar questions cannot arise as to stock dividends received since enactment of the 1936 Revenue Act because of substantial changes in the wording of Sec. 115 (f). But there are cases pending in the Board of Tax Appeals and the courts involving millions of dollars in taxes hinging on this proposition. The cases before the Supreme Court on petitions for certiorari are: No. 887, Helvering v. Gowran, decided against the Government December 22, 1936, by the Circuit Court of Appeals of the 7th Circuit, 87 F. (2d) 125, and No. 895, Helvering v. Pfeiffer, decided similarly February 15, 1937, by the Circuit Court of Appeals of the 2nd Circuit, 88 F. (2d) 3.

Eliminating Long and Short Haul Provision

The prohibition against common carriers charging or receiving greater proportionate compensation for transporting passengers or property for a shorter than for a longer distance will be repealed if the Pettengill bill (H. R. 1668) is enacted. It has passed the House and, as this is written, is in the Interstate Commerce Committee of the Senate.

There would still remain, however, the undue preference provision which would be expected to prevent unfair results from the lower rate for the longer haul and the burden would be on the carrier of justifying its rates against the charge of undue preference. The provision also would be retained preventing greater compensation as a through rate than the aggregate of the intermediate rates. Charges, rates, and fares in effect, at the time the bill may be enacted, on orders of the Interstate Commerce Commission, or in respect to which action was pending, would not need to be changed until the further order of the Commission.

Amending Government Contract Requirements

Supplementing and changing the original Walsh-Healy Public Contracts Act of June 30, 1936, these same members have introduced bills apparently destined for serious consideration at this session of Congress. They are S. 2165 and H. R. 6449.

If this measure is enacted, the requirements of the statute will extend to contracts of more than $2,500, instead of the previous limit to $10,000 contracts. Contracts for services would be included as well as those for supplies; and bidders who violate the National Labor Relations Act would be on the ineligible list along with contractors delinquent under this act who are ineligible to bid for three years. Bids by dealers would be required to be accompanied by certificates that their goods were manufactured pursuant to the labor requirements of the act.

Manufacturers would be relieved of paying a daily overtime rate if they conform to the 40-hour week provisions. An exemption would be created of contracts for public utility services such as electric light and power, water, steam, and gas; and, whenever the President finds a national emergency exists, he would be authorized to suspend application of the statute to such contracts as he deems necessary.

Pending U. S. Legislation

Three bills affecting shorthand reporters are pending in Congress. H.R. 4736 (S. 1435) establishes a National Board of Shorthand Reporting and provides for examination and certification of Federal Certified Shorthand Reporters. H. R. 4737 (S. 1436) provides for the employment of skilled shorthand reporters in the executive branch of the Government, and makes the certified transcripts of such sworn reporters prima-facie evidence of their correctness in the courts of the United States. H. R. 5015 provides for official shorthand reporters in Federal Courts. Support of these measures by the bar is invited and will be appreciated.

National Shorthand Reporters Association.
A. C. Gaw, Secretary,
Elkhart, Indiana.

A New Book of Unauthorized Practice Decisions

AN announcement concerning a new book of unauthorized practice decisions is of interest to all lawyers and particularly to those who have been working on the elimination of unauthorized practice.

Mr. George E. Brand of Detroit, former chairman of the Detroit Committee on Unauthorized Practice, who is now a member of the American Bar Association and Michigan State Bar Committees on this subject, has done a thorough piece of work in collecting and digesting more than 250 important American decisions which deal with unauthorized practice, including important opinions which have been rendered up to March of this year. The decisions cover 720 pages and the book will be bound in buckram and will contain alphabetical and state tables of cases, classification of cases under identifying headings and a comprehensive index. It includes a number of unreported decisions of lower courts which are not elsewhere available.

The Detroit Bar Association has assisted in the original financing, although the Michigan State Bar and the American Bar Association have joined in the project. The Michigan State Bar Association has ordered two hundred copies for distribution to judges and local bar unauthorized practice committees.

The book is dedicated "to the Unauthorized Practice of Law Committees of local, state and national bar associations, in the sincere hope that it will, somewhat, lessen the burden of their unselfish service by making available relevant material not otherwise readily accessible."

"Mr. Brand is a past-president of the Detroit Bar Association, a member of the House of Delegates of the American Bar Association, First Vice-President, Commissioner at Large and Chairman of the Committee on Grievances of the State Bar of Michigan and member of the Michigan Board of Law Examiners. His extensive experience fits him admirably to know what is particularly useful from the bar association angle in reference to unauthorized practice. All services on the preparation of the book have been donated.

Copies of the book of "Unauthorized Practice Decisions" will be available at the American Bar Association headquarters as soon as it is published, at a price of $2.75 per copy (printing cost) postage prepaid. Orders are now being accepted.

Entertainment of American Delegation to Comparative Law Conference at The Hague

THE Committee in Charge of Arrangements for the American delegation to the Second Conference on Comparative Law, which will arrive on the S. S. Champlain at Plymouth on July 31, 1937, announces that advices have been received from London to the effect that plans are being made to entertain the delegation upon its arrival in London on July 31, 1937. The General Council of the Bar has arranged the following tentative program:

July 31st, 2:15 p. m. to 2:30 p. m.—Reception of welcome by Lord Macmillan (one of the Lords of Appeal, who correspond in some respects to Judges of the Supreme Court of the United States) and the Attorney General of England (Sir Donald Somervell, K.C.M.P.), probably in the Hall of the Middle Temple which is the doyen of the Halls of the Inns of Court.

3 p. m.—Visit to the Record Office and Museum (which is being specially arranged as it is normally closed on Saturday). The documents of special interest to Americans will be put on view as upon the visit in 1924.

4:30 p. m.—Informal Tea party in the Inner Temple Hall by invitation of the Treasurer and Masters of the Bench of the Inner Temple.

Dinner at private houses. The Law Society probably will give some sort of Evening Reception about 9:30.

Arrangements are also being made by officers in charge of Bar activities in Paris for a reception of the American lawyers by the President of the French Republic. A reception is also being arranged by the Mayor of Paris. The Batonnier of the Order of Advocates at the Court of Paris is also interested in the visit to Paris during the return of the American delegation and is making plans to receive the delegation at the Palais de Justice. Visits will also be made to Sainte Chapelle and the historical crypt where Louis XVI and Marie Antoinette were detained during the French Revolution and to other places of especial interest to lawyers. The Paris World Exhibition will then be in full swing and arrangements for visits to it are also being made by those in charge of the program.

Plans for entertainment of the delegation at Brussels are receiving consideration.

Several members of the delegation have prepared papers to be delivered on board the "Champlain" during the voyage across the Atlantic.

Dr. Elemer Balogh, permanent secretary general of the Congress of International Comparative Law wrote recently that he was very glad that "a delegation of the American lawyers would go to The Hague in a body." He said, "We have changed the date of the Congress. It will be held from the 4th of August to the 11th of August, 1937, instead of from the 26th of July to the 1st of August. This was done at the request of the English Bench, since many eminent Judges desire to be present."

Binder for Journal

The JOURNAL is prepared to furnish a neat and serviceable binder for current numbers to members for $1.50. The price is merely manufacturer's cost plus expense of packing, mailing, insurance, etc. The binder has back of art buckram, with the name "American Bar Association Journal" stamped on it in gilt letters. Please send check with order to JOURNAL office, 1140 N. Dearborn St., Chicago, Ill.

THE PRESENT SITUATION IN THE FIGHT TO SAVE THE COURT

Fairness and Courtesy Characterized the Lengthy Hearings Leading up to the Report of the Senate Judiciary Committee—The American People Owe a Great Debt to the Members of the Senate Who Have Courageously Disregarded Party Lines and Rendered Distinguished Service to the Cause of An Independent Judiciary—Particularly Is This True of the Ten Senators Who Patriotically Voted For an Adverse Report on the Bill—Critical Period Ahead When the Immediate Fight on the Senate Floor Will Be to Prevent the Adoption of a So-Called "Compromise" for a Less Number of Added Justices or for a Retarded Time Schedule for the Remaking of the Court—Attitude of Members of House of Representatives Important—Every Congressman Should Be Acquainted with the Views of His Constituents — Issue Does not Permit of Compromise — American Bar Association on Record Against Adding Two or Four Members to Court—Duty of the Bar, etc.

By Sylvester C. Smith, Jr.

Member of House of Delegates from New Jersey—Chairman of American Bar Association's Special Committee on Supreme Court Proposal

I AM writing this article as an interim report to the members of the American Bar Association and other lawyers as to how matters stand in the contest against the remaking of the Supreme Court and other Courts of the United States. The situation in the Congress is subject to constant change, and I can only review developments as I see them up to the time of the writing of this article (May 27th).

The hearings before the Senate Judiciary Committee were perhaps unusual, because the attitude and votes of several members of the Committee were actually determined by the earnest arguments presented in opposition to the President's Supreme Court proposal. No member of the Committee who had indicated opposition to the Ashurst-Maverick bill was persuaded to its support by anything presented at the hearings or outside them; but a number of Senators who had manifested early pre-disposition to support the bill were led to vote against it, because of the cumulative effects of the arguments in opposition by men and women who spoke the views of enlightened and reasoned liberalism. Any basis for claiming that the bill is democratic (with a small or large "d") or worthy of the support of American liberals, was disproved by an impressive procession of witnesses who authoritatively repudiated the measure as repugnant to its asserted objectives.

The hearings were presided over by Senator Ashurst with tolerance and great patience; and all the members of the Committee are to be commended for their constant fairness and courtesy, in the conduct of the hearings.

THE ACTION OF THE JUDICIARY COMMITTEE

When the Judiciary Committee voted on May 18th, the effects of the long hearings and the great volume of protests received by the members of the Senate from their constituents were manifest. An adverse report on the bill as a whole was directed by a vote of 10 to 8. Various "compromise" or substitute proposals were voted down by the same or a greater number of votes, with the adherents of the original bill generally supporting such "compromise" amendments as would add Justices to the Court in lesser number than six. At the time of the writing, the majority and minority reports upon the bill are being prepared, and have not reached the floor of the Senate.

The American people owe a great debt to those members of the Senate who have courageously disregarded party lines, and, with conscientious regard of their oath to support the Constitution, have rendered a distinguished service to the cause of an independent and impartial judiciary. Particularly should there be hearty public appreciation, equally in disregard of party lines, of the patriotic stand taken by the ten senators who voted for an adverse report on the bill:

Senator Burke, of Nebraska,
Senator Connally, of Texas,
Senator Hatch, of New Mexico,
Senator King, of Utah,
Senator McCarran, of Nevada,
Senator O'Mahoney, of Wyoming,
Senator Van Nuys, of Indiana,

Democrats.

SENATOR BORAH, of Idaho,
SENATOR AUSTIN, of Vermont,
SENATOR STEIWER, of Oregon,
Republicans.

CRITICAL PERIOD AHEAD

Only an irrepressible optimist would assume that the effort to enlarge the Supreme Court to enable the present appointment of additional justices has ended with the adverse vote in the Senate Judiciary Committee. On the contrary, there are indications that the action of the Committee had been largely discounted by supporters of the proposal, and that the most critical stages in the fight against the bill will date from the Committee vote, rather than precede it. Present indications are that the efforts of the proponents in the Senate are not being centered upon the passing of the bill for six extra Justices. The effort is, and will be, to obtain favorable action upon some so-called "compromise," either by way of an increase of the Court to ten or eleven members, or by way of limiting the original proposal by a proviso that no more than one Justice shall be appointed in any calendar year, over and above the filling of such vacancies as shall arise by death or retirement.

In the Senate, the proposal to add six Justices to the Court in the manner first proposed seems to be definitely lost at this time. When the Committee report comes to the floor of the Senate, the immediate fight there will be to prevent the adoption of a so-called "compromise" for a lesser number of added Justices or for a retarded time schedule for the remaking of the Court.

ATTITUDE OF THE MEMBERS OF THE HOUSE OF REPRESENTATIVES HIGHLY IMPORTANT

At almost any time, the issue may become acute in the House of Representatives, where the leadership has so far been content to await action by the Senate upon the bill. An effort may soon be made to report out and pass in the House substantially the original bill. If the Senate should in the meantime pass a different measure, both bills would go to conference, with the conference committees appointed by the Vice-President and the Speaker of the House of Representatives. In such a situation, there would be great danger that the final bill would be written by a conference committee favorable to the proposal, and that on some torrid August day, when the legislators are weary, hot, and uncomfortable and the sweltering country is vacation-minded and silent on the Court issue, such a bill would come from conference and be rushed to a decisive vote.

MEMBERS OF THE RULES COMMITTEE OF THE HOUSE OF REPRESENTATIVES

John J. O'Connor, New York, *Chairman;*
Adolph J. Sabath, Illinois;
Arthur E. Greenwood, Indiana;
E. E. Cox, Georgia;
William J. Driver, Arkansas;
Howard W. Smith, Virginia;
J. Bayard Clark, North Carolina;
Martin Dies, Texas;
Byron B. Harlan, Ohio;
Lawrence Lewis, Colorado;
Joseph W. Martin, Jr., Massachusetts;
Carl E. Mapes, Michigan;
J. Will Taylor, Tennessee;
Donald H. McLean, New Jersey.

Under such circumstances, the attitude of the members of the House of Representatives is now of the utmost importance. Every Congressman should be acquainted thoroughly with the views of his constituents on the Court issue. If the tactics of the supporters of the measure should shift the fight to the House of Representatives, the attitude of its Judiciary Committee and Rules Committee would be most influential. If the Judiciary Committee declines to report the bill, a petition signed by some 226 members will be required to bring it upon the floor for a vote.

The House Judiciary Committee is composed of able lawyers. Upon many matters vitally affecting the Constitution, the Courts, and the administration of justice, the members of this Committee have repeatedly shown courage and good sense, and have been responsible for the enactment of much worth-while legislation. A number of members of the House Rules Committee are likewise able lawyers of excellent reputation in their communities. I have a great deal of confidence in the patriotism and devotion to the American Way, on the part of the members of these Committees, and believe that they are ready to stand firm in opposing the adoption of these drastic proposals, which few members of either the Senate or the House would vote for in a secret ballot on the merits, apart from any question of party loyalty and administration pressure.

I happen to be a regular democrat, holding an appointive office in my State. I voted for, and publicly supported, President Roosevelt in 1932 and 1936. I have been and am in sympathy with most of the social and economic objectives of his administration. But I share the feeling of many members of the Senate and the House that no question of party regularity can arise when the independence and impartiality of the United States Supreme Court is the issue. I feel that those Democrats who are opposed to the Court bill are helping to save their President, their party, and their country from a great mistake.

THE ISSUE DOES NOT PERMIT OF COMPROMISE

One is aware that some people would prefer to see two Justices added to the Court, rather than six, and that some are attracted by the idea that

the damage to an independent judiciary would be less if only one or two additional Justices were added in any calendar year. For my own part, I cannot view an issue of such vital principle in any terms of compromise. Differences in degree or time schedule are of little importance, if the principle of an independent judiciary is violated, as I think it would be, by the addition of any Justices to the Court under the present circumstances.

Proponents who seek to violate the principle of an independent Court by controlling it, may debate and decide whether *they* will accept six, four, or two-additional Justices; but those who seek to save the principle of an independent judiciary, and our American form of government, can have no part in such discussions, which actually relate only to the tactics of the opponents of the Court. Friends of a free Court will fight to the last against remaking the Court under political pressure, and against any change in its structure or powers, except through the submission of constitutional amendment to the States and the people.

AMERICAN BAR ASSOCIATION VOTED AGAINST ADDING TWO OR SIX MEMBERS TO COURT

The mail-ballot vote of American Bar Association members, in the ratio of six to one, against adding six Justices to the Supreme Court, is not the only action which the Association has taken against enlarging the Court. At the 1936 annual meeting of the Association, held in Boston last August, the members present at the largest annual meeting the Association has ever held, took action upon a report by the Standing Committee on Jurisprudence and Law Reform, which recommended disapproval of a bill providing for adding two Justices to the Supreme Court, and another bill which provided for adding six Justices (1936 Annual Report Volume, pages 196-198, 659).

The Committee's report said:

"Most threatening are proposals to increase the membership of the court in order to change its complexion and that regardless of the necessities of its business. Indeed, this is the Achilles heel of the Constitution. Based upon the fundamental theory of effectual counterpoise among the legislative, executive and judicial departments, the Constitution yet leaves it within the power of Congress and the Executive to overcome that balance. All that is necessary is a single Act of Congress increasing the membership of the court, executive appointment and senatorial confirmation. Thereafter the fate of the Constitution is committed to the judicial consciences of the new members. At least once in our history such action was proposed and seemed not unlikely to be taken. The sole brake upon it then and now is an aroused public opinion. Once the people accept the view that the court should be but an instrumentality for validating the will of the Congress the method for accomplishing this purpose is ready at hand. Under present day conditions, when by instantaneous means of communication the fleeting moods of public opinion may be rapidly mobilized, this danger is more real than it has ever been in the past."

The recommendation disapproving the increase to eleven members, as well as the increase to fifteen members, was *unanimously* adopted (Ibid, page 198).

SHALL ADDITIONAL JUDGES BE APPOINTED IN OTHER FEDERAL COURTS?

One of the dangers of the present situation is the possibility that if the proposed enlargement of the Supreme Court is defeated, the portions of the bill which would apply to the other Federal Courts the same unsound principles which violate the spirit of the Constitution, will be separately enacted. Members of the American Bar Association and the non-member lawyers voted against such arbitrary enlargement of the Circuit and District Courts, by a total of 51,156 against, and 18,533 in favor. Any passage of this part of the bill would be a public misfortune, hardly less serious than the addition of justices to the Supreme Court. If these provisions were separately enacted, the President would be enabled to appoint immediately thirteen District Court judges and six judges of the Circuit Court of Appeals and the Court of Appeals of the District of Columbia. The Federal Courts by 1941 would be enlarged by the appointment of 44 additional judges. *But the evil of all this is that practically none of these extra Circuit and District judges would be appointed in Districts and Circuits where they are at all needed to speed up the administration of justice.* Only one of the additional thirteen District Judges would be appointed in a district where serious congestion (delay of six months or more) exists. Yet there are eighteen such districts, out of

MEMBERS OF THE JUDICIARY COMMITTEE OF THE HOUSE OF REPRESENTATIVES

Hatton W. Sumners, Texas, *Chairman;*
Andrew J. Montague, Virginia;
Emmanuel Celler, New York;
Zebulon Weaver, North Carolina;
John E. Miller, Arkansas;
Arthur D. Healey, Massachusetts;
Robert L. Ramsay, West Virginia;
Francis E. Walter, Pennsylvania;
Walter Chandler, Tennessee;
Charles E. McLaughlin, Nebraska;
William M. Citron, Connecticut;
Sam Hobbs, Alabama;
Abe Murdock, Utah;
John H. Tolan, California;
Edward W. Creal, Kentucky;
Robert P. Hill, Oklahoma;
William T. Byrne, New York;
George D. O'Brien, Michigan;
Frank W. Towey, Jr., New Jersey;
U. S. Guyer, Kansas;
Clarence E. Hancock, New York;
Earl C. Michener, Michigan;
John M. Robsion, Kentucky;
Chauncey W. Reed, Illinois;
John W. Gwynne, Iowa.

a total of eighty-five districts in the United States.

Citizens therefore face immediately the question of whether they are willing that the Federal judiciary should be subordinated to the will of the Executive through such wholesale and unnecessary enlargement, or whether the Congress shall continue its policy of providing for additional judges in those Districts and Circuits where the facts and circumstances show that they are needed to properly handle the business of the Courts and permit the prompt administration of justice.

Our Committee therefore urges that lawyers and citizens should consider this question and communicate their views, in reference to this phase of the proposed bill, to their representatives in the Congress.

PROVISIONS OF THE BILL AS TO ASSIGNMENT OF JUDGES

Another aspect of the pending bill seems to me to warrant consideration by the Bar, and the further expression of considered views of citizens. There is some doubt as to the present status of the bill's provisions with reference to the assigning of judges by the Chief Justice. The original bill applied only to "judges hereafter appointed." It is reported that the Senate Committee voted to strike out the phrase "hereafter appointed"; in effect, this changes the present law requiring the concurrence of the Senior Circuit Judges, to such assignments. One doubts if this effect was intended. The lawyers voted in favor of assignability of judges, but I question if they intended to indicate approval of such a provision on any basis other than that now in force.

The statute (U.S.C. tit. 28, sec. 22-23) empowers the designation of a particular judge for the discharge of a specific duty, (e.g., the trial of a particular case or the hearing of a particular appeal outside his district), but further requires the concurrence of the senior Judges of the two Circuits affected to make such an assignment. The Ashurst-Maverick bill would remove the requirement of such concurrence. Judge John C. Knox, Senior District Judge of the U. S. District Court for the Southern District of New York, before the Senate Judiciary Committee, presented persuasive reasons why a Circuit or District Judge ought not to be made assignable to try a particular case, or to hear a particular case on appeal, in a Circuit or District other than his own, without the concurrent consent, as the present law requires, of the Senior Circuit Judges of the Circuits affected. Every lawyer should read and weigh his statement on this subject.

No one would presume to say that the unrestricted power of assignment would be abused by the present Chief Justice, or by a Chief Justice appointed by the present Executive, or by anyone whom the American lawyers would expect to see elevated to that great office. Nevertheless, the requirement of concurrence by the Senior Circuit judge before his Circuit is entered by judges sent from other Districts to try particular cases (say cases in which the Government is interested), seems a desirable limit of autonomy for each Circuit, which should not be lightly taken away. It tends to preserve some of the sectional rights, and to prevent the concentration of power in Washington. Local confidence in the fairness of the judges whom the people of the District and Circuit know, is a vital factor in the satisfactory administration of justice. Forty-two percent of all the cases heard in the District Courts throughout the United States, excluding bankruptcy cases, are cases in which the Government has an interest adverse to that of citizens. Judge Knox's statement specifically illustrates what he meant by saying that

". . . so far as the Southern District of New York is concerned, I desire that it should never for any purpose whatsoever be beleagured by a flying squadron of judges, who, perhaps, under some conditions, might properly be classified as privateers."

If lawyers and other citizens wish the assignability of judges to remain subject to the concurrence of the Senior Circuit Judge, they should promptly make their views known to their representatives in Congress, and particularly to the members of the Judiciary Committees of the House and the Senate.

THE SUMNERS-McCARRAN LAW

At the 1936 annual meeting of the Association, held in Boston last August, the members present voted unanimously to recommend to the Congress the enactment of what is now the Sumners-McCarran law, to permit the voluntary retirement of Justices of the Supreme Court. The members of the Association taking part in the mail-ballot referendum last March also voted strongly for this measure, which became law soon afterwards.

The American Bar Association's Standing Committee on Jurisprudence and Law Reform reported to the Boston meeting as follows, concerning this bill:

"Federal Circuit and District Judges have long had the right, under Section 260 of the Judicial Code as amended (U. S. C., title 28, Section 375), to retire voluntarily rather than resign, and they remain subject to certain assignments to judicial duties after such retirement. In Booth *vs.* United States (291 U. S. 339; decided February 5, 1934), it was held that the provision of the Economy Act of 1933, undertaking to reduce the retired pay of judges who had retired under Section 260 of the Judicial Code, was invalid as to Circuit and District Judges, under Section 1 of Article III of the Constitution, which forbids the diminution of the salaries of judges during their continuance in office. Retirement under Section 260 of the Judicial Code was not held to be tantamount to resignation and did not end continuance in office.

"Chairman Sumner's bill would give to Justices of the Supreme Court the same rights and privileges, with the same status as to compensation, as are now and have been

hitherto enjoyed by Circuit and District Judges. It would thus in effect remove the exception now operative against Justices of the Supreme Court, and would allow to them the same privilege of voluntary retirement rather than resignation, and would give a safeguard against reduction in their retired pay during the rest of their lives. The bill would not create any basis for compulsory retirement, and would not be likely to increase the likelihood of voluntary retirement.

"It seems to be a fair and fitting thing that the present anomalous exception against Justices of the Supreme Court should be removed, and that they should be allowed the same rights and privileges, on voluntary retirement, as are possessed by Circuit and District Judges. We recommend that the Association favor the enactment of the bill (H. R. 7911) into law."

This measure was carefully considered, by the Committee and by Association members. Such questions as are being raised, under the law, represent the views of individual lawyers and have not been supported by the Association or by any of its officers or Committees.

THE DUTY OF THE BAR

The attitude of your Committee has been to encourage public discussion on both sides of this question, throughout all the States, particularly in local community groups, in order that people might understand the seriousness of the Court proposals, their probable effects upon our form of government, and their threat to an independent judiciary. We still believe that this discussion method should be fostered, encouraged and developed by the members of the Association, in conjunction with other citizens in all walks of life. This is the American way, under the Constitution, for deciding such questions. The mere passing of resolutions by Bar Associations can not be a sufficient performance of the obligation which the lawyers of America owe to the public generally. In America, we sometimes jump to conclusions by the use of phrases, such as "five to four," "liberal and conservative," "property rights and human rights," without conceiving the real facts and implications. The ruin of a democracy in the past has been foreshadowed by impetuous and ill-considered political action affecting the integrity of independent departments of government. The American Way is the system of checks and balances. The forward movement to greater social justice and economic progress may appear at times to be delayed temporarily by such a system of government, but it is not defeated or stayed. The value of the delay resulting from our traditional course is the preservation of justice and liberty, to minority groups and to individuals, which is essential to real social justice and economic progress. We ask that the lawyers of America, no matter what their views, demonstrate that the legal profession in America has faith in the democratic processes, and that our profession shall help lead the way to right decision by the people and the Congress on the Court issue, through full and free discussion, without passion, prejudice, or partisanship. If this is done now, the lawyers of America will have served their country well.

Arrangements for Annual Meeting, Kansas City, Missouri

September 27—October 1, 1937

HEADQUARTERS:
MUNICIPAL AUDITORIUM

Hotel accommodations, all with bath, are available as follows:

	Single for one person	Double (Dble. bed for two persons)	Twin beds for two persons	Parlor Suites
	$	$	$	$
Aladdin	2.00 to 2.50	3.00 to 5.00	4.00 to 7.00	
Ambassador	3.00 to 4.50	5.00 to 8.00		
Baltimore	3.00 to 4.00	4.00 to 9.00	5.00	10
Bellerive		5.00	6.00	8 & up
Bray	2.00 to 3.00	3.00 to 5.00		
Commonwealth	2.50 to 3.00	4.00 to 5.00	5.00 to 6.00	8
Kansas Citian	2.50 to 3.00		3.50 to 6.00	10
Phillips	3.50 to 4.00	5.00 to 7.00	6.00 to 8.00	8 to 15
Pickwick	3.00 to 4.00	4.00 to 5.00	5.00 to 6.00	
President	2.50 to 4.00	3.50 to 5.00	4.50	
Robert E. Lee	1.50 to 2.50	2.50 to 3.50	3.50 to 4.00	
Savoy	2.50	5.00		6 to 12
Sexton	2.00	3.00	5.00	
Stats	2.50 to 3.50	3.50 to 5.00	6.00 to 7.50	
Westgate	1.50 to 2.50	2.50 to 3.50		

Explanation of Type of Rooms

A single room contains either a single or double bed to be occupied by *one person.* A double room contains a double bed to be occupied by *two* persons.

A twin-bed room contains two beds to be occupied by two persons. A twin-bed room will not be assigned for occupancy by one person.

A parlor suite consists of parlor and communicating bedroom containing double or twin beds. Additional bedrooms may be had in connection with parlor.

To avoid unnecessary correspondence, members are requested to be specific in making requests for reservations, stating hotel desired, number of rooms required and rate therefor, names of persons who will occupy the same, and arrival date, including definite information as to whether such arrival will be in the morning or evening.

Requests for reservations should be addressed to the Executive Secretary, 1140 North Dearborn Street, Chicago, Illinois.

THE SUPREME COURT AND THE RIGHTS AND INTERESTS OF LABOR

Statement of Mr. John H. Crooker, Texas Lawyer Representing Labor's Side in Important Litigation, Made before Judiciary Committee of the Senate — "I Have Reviewed Rather Closely Practically All of the Cases and I Say Quite Positively That, Viewed as a Whole, the Decisions Have Been Overwhelmingly in Favor of Labor's Contentions"—The Relatively Few Cases in Which the Decisions Might Be Said to Be Adverse to the Supposed Interests of Labor Have Turned for the Most Part on the Construction of Federal Laws, and the Remedy Has Thus Been Completely in the Hands of Congress — Impressive List of Laws in Labor's Interest Which the Court Has Sustained, etc.

SENATOR CONNALLY. Mr. Crooker, state your name and residence and occupation, please?

MR. CROOKER. My name is John H. Crooker; I live in Houston, Tex. I am in the general practice of the law at Houston, Tex., where I have resided and been engaged for some 26 or 27 years, Senator.

SENATOR CONNALLY. Were you at any time the holder of any public office?

MR. CROOKER. I was district attorney for four years at Houston before the war and up to the war.

SENATOR CONNALLY. Were you in the military service during the war?

MR. CROOKER. Yes, I was. I was first attached to a rifle company at Camp Logan as an enlisted man, but received a commission from the Judge Advocate General's Office after I arrived, and served during the war as a major.

SENATOR CONNALLY. That is a pretty good promotion, from a private to major at one jump?

MR. CROOKER. It just happened all one morning, Senator; it was quite a promotion, but I had been sort of expecting it, but did not know whether it would happen or not for some time.

SENATOR CONNALLY. You were in the Army until the end of the war?

MR. CROOKER. Yes; I was for some little time after the end of the war. The legal department were sort of kept on after the rank and file.

SENATOR CONNALLY. Mr. Crooker, have you occupied any other position of prominence or responsibility other than that of district attorney?

MR. CROOKER. No other public office outside of my major's commission in the Army, Senator.

SENATOR CONNALLY. Were you not at one time grand master of the Masonic Lodge of Texas?

MR. CROOKER. Yes; for a year, which is the limit in Texas for anyone to hold that office.

SENATOR CONNALLY. What year was that?

MR. CROOKER. That was 1935.

SENATOR CONNALLY. And you were grand master then. You may proceed now.

MR. CROOKER. As a preface to my statement, it seems appropriate to say as a citizen and a lawyer I share your concern as to a proper solution of the troublesome question which confronts this committee. It so happens that much of my professional life and activities has been devoted to legal problems affecting labor and to the trial of cases wherein the rights of labor were directly or indirectly involved. Accordingly, candor compels me to say that I examined the proposed legislation with an eye single to its effect on the general masses—however, in a large measure influenced by my viewpoint of labor's perspective.

There seems to be a good deal of misunderstanding, and considerable misstatement, as to just what the Supreme Court has decided in what may be termed "labor cases." I have reviewed rather closely practically all of these cases—perhaps a hundred cases in all—and I say quite positively that, viewed as a whole, the decisions have been overwhelmingly in favor of labor's rights and contentions.

In those relatively few cases that have been decided in a way that might be said to be adverse to the supposed interests of labor, most of the decisions have turned on the construction of Federal laws, such as the Sherman Act, the Clayton Act, and other similar laws. No serious question can be raised about the laws construed being open to meanings other than those found by the Court. In any event, the remedy is in the hands of Congress to change any or all of these laws in short order if they see fit to do so. I refer to such cases as the Danbury Hatters case, decided in 1908, the *Gompers case* (221 U. S. 418), *Duplex Printing Co.* v. *Deering* (254 U. S. 443), *American Steel Foundries* v. *Tri-Cities Central Trades Council* (257 U. S. 184), and *United Mine Workers* v. *Coronado Coal Co.* (259 U. S. 344). These cases were decided during the period from 1908 till 1922, and all of the Presidents

and all Members of Congress were fully advised as to what the Supreme Court had held. Much legislation favorable to labor has been passed since those early decisions, but to whatever extent the effect of any of those decisions ought to be changed, clearly Congress has undoubted power to enact such changes in statutes as will give labor any and all additional rights and safeguards which may seem proper.

Of course, it must be frankly admitted that the Supreme Court has declared unconstitutional both Federal and State statutes in cases where the holdings were adverse to labor's contentions. But for each case in which some act thought to be favorable to labor was declared invalid, there may be pointed out five times as many cases in which the Supreme Court has upheld acts in which labor was peculiarly interested. In this connection it may be pointed out that the Supreme Court has upheld every State employers' liability law that has been brought before it. The same is true as to every statute abrogating or modifying the fellow-servant doctrine—these cases being of unusual interest to workingmen.

In like manner the Supreme Court has upheld every State law that has come before it abrogating or modifying the doctrine of assumed risk—one of the most unfair and distasteful doctrines to the workingman that ever found its way into the lawbooks. Text writers agreed that the law doctrine of assumed risk is harsh and not favored by modern law, and some decisions call it a "damnable doctrine" that the courts are unwilling to extend or to apply in doubtful cases. And while that question is not before this committee, I hope I will be pardoned for suggesting parenthetically that if Congress wants to do something beneficial to labor that is fair and proper it should amend the Federal Employers' Liability Act by abrogating the doctrine of assumed risk that is now allowed under that act.

Returning to the immediate question, the record of the Supreme Court is 100 percent perfect for labor as to each and every State workmen's compensation law that has come before it. In no single case has the Supreme Court failed to uphold all of these splendid acts for the protection of those who toil with their hands, thus preserving the tendency to hold human rights above property rights. In like manner every State act as to hours and working conditions of women has been upheld. Also the Supreme Court has upheld almost without limit State laws regulating child labor, 8-hour-day laws, laws requiring payment of wages in cash rather than merchandise, etc.; semimonthly pay laws; acts requiring employers to give service letters to discharged employees; full-train-crew laws and full-switching-crew laws; safety measures and safety-appliance laws of all kinds; various laws for protection of coal miners; laws limiting the hours of labor for women; many and various mechanics and laborers' lien laws; several rent-control and housing laws; and literally dozens—yea perhaps a hundred—other such laws.

Thus it is demonstrated by the decisions of the Supreme Court that it has always preserved the rights and safeguarded the interests of labor. And now labor should rise in its might and reassert the truism so aptly expressed more than a century ago by John G. Jackson, of Virginia:

"An enlightened and independent Judiciary is the safeguard of the poor against the tyranny of the rich; it is the safeguard of the citizen against the tyranny of his Government. . . Our Judiciary is the sheet-anchor of safety against popular fury, or the more destructive though less violent attacks of usurpation."

In most cases where decisions were regarded as unfavorable to labor, defects in the early acts were remedied by later laws. The adverse decision in the first employers' liability case (1908) was cured by amended legislation. The effect of *Adair* v. *United States* (208 U. S. 161), and *Coppage* v. *Kansas* (236 U. S. 1)—usually referred to as the "yellow-dog contract" cases—was removed by the Railroad Labor Act of 1926 which act was sustained in its fullest vigor in *Texas & New Orleans Railway* v. *Brotherhood of Railway Clerks* (281 U. S. 548, 74 Law. Ed. 1934), in a unanimous opinion by Chief Justice Hughes. Likewise Congress has passed legislation regulating the interstate movement of prison-made goods and this wholesome act was upheld by the Supreme Court, thus paving the way for like legislation with respect to child labor. There can be little question about the Supreme Court upholding laws protecting child labor in every way possible insofar as concerns products moving in interstate commerce. Of course, we know that the Supreme Court very recently upheld the right of the several States to legislate with respect to minimum wages for women, thus overruling its action of 1923 in *Adkins* v. *Children's Hospital* (261 U. S. 251).

Congress has shown every disposition to be fair to labor, for example by enacting the Adamson law fixing 8 hours as the basic day for railway labor. The Supreme Court showed its judges to be no less friendly disposed toward labor by upholding the Adamson Act in the well known case of *Wilson* v. *New*. Surely no well-balanced lawyer will deny that the Supreme Court stretched legal rules almost to the limit in sustaining this law in which labor was so vitally interested.

Indeed it may well be said that the National Labor Relations Act goes to every limit in establishing and safeguarding the rights of labor that labor's most ardent advocate should ask for. And the courts have done their full part in upholding and enforcing this act, which readily appears from the splendid unanimous opinion by Circuit Judge Hutcheson of the fifth circuit in the late case of *Agwilines Inc.* v. *National Labor Relations Board* (87 Fed. [2] 146), Advance Sheets of March 1, 1937. Here may be found as clear and concise a résumé of labor's rights set forth and

upheld as can be found in the law books, all supported by numerous decisions of circuit courts and the Supreme Court. If labor is asking more from our courts than is given by that decision—as well as the cases cited therein—its requests have not come to my attention and it is difficult to perceive just what else the courts might be asked to do in labor's behalf.

And I am not to be understood as indicating that this timely holding by the Circuit Court of Appeals for the Fifth Circuit and the decisions cited go too far. Indeed, the case proceeds along exactly the same lines as the Brotherhood case which I personally conceived, worked out, and won through all the courts. Only last week I had the privilege of arguing to that very circuit court another most important labor case—there again urging the rights of the railroad brotherhoods as against an interstate carrier.

Further, do we not realize that courts and judges have always safeguarded human rights, even under the most trying circumstances? One of the cases which I mentioned earlier as being adverse to labor was American Steel Foundries against Tri-Cities Central Trades Council, in which the Clayton Act was interpreted. But the critics of that case neglect to state that Chief Justice Taft in that opinion warmly upheld the rights of union men on strike to engage in peaceful picketing and other forms of persuasion and appeal to strike-breakers and to the public.

Union men throughout the length and breadth of this country should not forget that the Supreme Court upheld this important right of peaceful picketing in this case, just as that Court has always placed its restraining hand on any part of the executive or legislative branches of the Government which sought to interfere with the fullest exercise of all rights by the citizens.

We all remember a few years back how martial law was declared so frequently in mining areas as soon as a strike was called. Lots of times this was followed by the strike leaders being tried before some military tribunal, and the ordinary civil courts would hold that the Governor's proclamation declaring martial law was conclusive that a state of insurrection existed and no one could inquire further. For many years that seemed to be the rule, and the Congress took no action whatever to relieve against the injustice. Directly a three-judge Federal court in my own home city of Houston held that the courts could go behind the Governor's proclamation and see if there really existed a state of insurrection. And here, again, the United States Supreme Court, in *Sterling* v. *Constantine* (287 U. S. 378, 77 Law. Ed. 375), upheld human rights against official usurpation—poor strikers may no longer be tried by the military; obscure citizens may no longer have their property and rights overridden by the military without any power being vested in courts to look into the matter and stop whatever may be improper and unlawful.

Much the same is true as to religious liberty. Not many years ago an anti-Catholic movement got control out in one of our Western States and promptly they passed a law and sought its enforcement against any parochial schools, even though the Catholics of that State built and maintained their own schools to which they wanted to send their children. Religious intolerance held such sway that the governmental forces of that State were doing everything possible to do away with all Catholic schools and to prevent the Catholic families from educating their children the way they saw fit and in the schools which they alone supported. The local courts seem to have responded to what was pressed upon them as a "mandate of the people in two elections," but the ears of the Supreme Court Judges were not attuned to popular clamor of that kind, and that great tribunal said, "You can't do that," and saved that State from its intolerance. This was the case of *Pierce* v. *Sisters of the Holy Name* (268 U. S. 510, 69 Law. Ed. 1070), opinion by Justice McReynolds. I have always felt that schools of any and all creeds should be supported by the churches interested in maintaining them, and not by the State, but by the eternal I believe just as strongly that the people of any church or creed have undoubted right to build and support and conduct all the schools they may desire, and thank God for a Supreme Court which will always see to it that such rights of religious liberty are preserved in this country to people of all beliefs.

And right over in one of our neighboring States we remember how a powerful political figure had laws passed taxing almost out of existence some of the newspapers which had the hardihood to oppose the things which he claimed some two or three "mandates from the people" to put into effect. And here again the Supreme Court, speaking through the conservative Justice Sutherland, said, "You can't do that," and upheld the freedom of the press—one of the most cherished of the rights of a free people—the case being *Grosjean* v. *American Press Co.* (297 U. S. 233, 80 Law. Ed. 660).

SENATOR CONNALLY. What State was that from?

MR. CROOKER. That is from Louisiana, Senator.

A somewhat different situation arose in Minnesota, and yet the same general principle was involved. There a small publication severely criticized the grand jury and certain State officers in connection with their handling of some matter of public concern. The criticisms were so severe against the political folks in power that the Minnesota Legislature was induced to pass a law permitting the stifling and suppression of the publication by injunction as in cases of abating a public nuisance. All the Minnesota courts ruled against the publisher, but he took the case to the United States Supreme Court, and there again, in an opinion by Chief Justice Hughes (*Near* v. *Montana*, 283 U. S. 697, 75 Law. Ed. 1357) that Court upheld the freedom of the press, joining in effect with Milton's immortal plea,

"Give me liberty to know, to utter, and to argue freely according to conscience, above all liberties."

Just a few years ago down in Texas a powerful railroad undertook to coerce its employees to join a company union, at the same time interfering with these employees in being represented by persons of their own choice in negotiating with the railroads for agreements as to pay, hours, and working conditions. This was in violation of the plain letter of the Railway Labor Act passed by the Congress but which the railroad attacked as unconstitutional. Here again the holding was with the railroad employees, the railroad was ordered to reinstate some men discharged, and the president of a great railroad system was ordered to jail for contempt if he willfully refused to comply with the court's orders. Of course, the railroad appealed all the way to the United States Supreme Court, and I had the honor of arguing the case at the bar of that great tribunal. Chief Justice Hughes, speaking for a unanimous Court, upheld the lower courts. And only 2 weeks ago the Supreme Court, by another unanimous decision, upheld the amended Railway Labor Act of 1934, which goes further in favor of railroad employees.

Other like decisions might be cited, almost without limit, but certainly anyone who follows closely the decisions of the United States Supreme Court dealing with human rights, social problems, and economic questions should realize that practically all those decisions are well abreast of the most modern trend of our times.

Indeed there are but a very few decisions of the Supreme Court that even the most progressive among us are out of harmony with—while there are literally hundreds of strong and important decisions from that great tribunal which form the very mud sills of all of our cherished rights.

Viewing the whole question under consideration, and having in mind the splendid manner in which the Supreme Court has protected and safeguarded the welfare and interests of the general masses—and especially those of labor and wage earners—the conclusion seems inescapable to me that we should "make haste slowly" in tampering with the Supreme Court.

Yes; we sometimes feel that progress should be hastened and that the orderly processes of our courts and our laws move rather slowly. But it must be remembered that if the Constitution and our laws shifted freely in an effort to keep pace with all change, they would merely trail human life instead of guiding it. Our Constitution and laws must be the balance wheel —the governor on the machine—seeing to it that we progress and advance with certainty and accuracy, rather than merely to move speedily without due regard for direction and ultimate goal. Indeed, the law must be something of a summary of the basic and very best from all ages. Its primary concern is about what is timeless and fundamental—the unerring right and wrong of things—right and wrong that never change. Surely the Constitution and the law must never become mere frail straws tossed here and there with each eddy and cross-current. But heavily freighted with the wisdom and experience of all the people of all the ages the law must ride the deep and lasting channels of time. . .

SENATOR AUSTIN. Mr. Chairman, I have been very interested in this statement, because it seems to afford a history of judicial interpretation relating to the interests of labor, which is something that we have before this tried to bring about and have not been so successful as we had hoped to be.

It has occurred to me that there is a line of decisions by the Supreme Court to which attention ought to be called at this time, and I want to ask you, Mr. Crooker, if you are familiar with them. They arise in the interpretation of the various rules in different State statutes affecting the trial of labor cases. For example, in Vermont, we had a rule that imposed a burden on the plaintiff, who we will say is a brakeman or a brakeman's widow, in trying to recover damages against the railroad company, requiring the plaintiff to show that the plaintiff or the plaintiff's intestate was free of any negligence that contributed in the least degree to his injury. Of course, the railroad company in such cases would always claim that burden had not been discharged by the plaintiff and would ask for a verdict in favor of the defendant.

Now, one of those cases was White, administratrix of her husband, who was a brakeman, against the Central Vermont Railway, and it is reported at Two Hundred and Thirty-eighth United States Reports at page 507. It came to the Supreme Court in 1915. That was early after the Federal Employers Liability Act came into effect. Do you recall that the Supreme Court in that case held substantially as follows? I am not reading from the case, but from the dicta.

SENATOR CONNALLY. You mean the syllabus, do you not?

SENATOR AUSTIN. We call it "dicta" in Vermont.

SENATOR CONNALLY. You are wrong.

MR. CROOKER. We would say that is wrong in Texas.

SENATOR AUSTIN. "The Federal courts have uniformly held that as a matter of general law the burden of proving contributory negligence is on the defender, and have enforced the principle even in the States which hold, as does Vermont, that the burden is on the plaintiff of proving that he was not guilty thereof."

Do we not find in the mass of our jurisprudence that comes from decisions of the Supreme Court this type of case, which builds up for labor an assurance of its right in the administration of justice?

MR. CROOKER. Senator, I am frank to say to you that that case has come to my notice only very casually. I try a few of the good personal injury cases. I do not get a lot of them. I always represent the plaintiff. I never represented a railroad. The courts of my State

are not concerned with any such rule as was attempted to be made in Vermont. Therefore, I never have any direct connection with or any definite reason for the study of those cases. I never happened to look into them. But as you read the syllabus in that case, it seems to me it might well be added as another reason. It seems to me the decision in that case, as I gather it from the syllabus which you read, was distinctly favorable to labor. Do you not think it was?

SENATOR AUSTIN. I know it was.

MR. CROOKER. Yes. There seems to be no doubt about it. Whereas the legislature of Vermont undertook to shift the burden in favor of corporate influence or the railroad, the Supreme Court said they could not do that. The Federal courts have always held the burden to be on the defendant to show as an affirmative defense contributory negligence. That is the rule in my State. I know it was in the Federal courts, and it was upheld by the Supreme Court.

That particular case has never come to my attention, sir, but it seems plain and clear that it might well be added as another example of how the Supreme Court has kept the State legislatures from overturning our principles of what we American lawyers think, I believe, is proper procedure on the part of the Court; First, that he was injured; second, generally, that the negligence of the employer was a proximate cause of the injury; and third, the resulting damage. That constitutes a case. If the railroad wants to prove contributory negligence, it may take the laboring oar and do it. That ought to be the law. I would have added it to my memorandum if it had been called to my attention.

SENATOR BURKE. Will the Senator from Vermont yield?

SENATOR AUSTIN. Yes.

SENATOR BURKE. The Senator from Vermont states that he knows the holding of the Court in that case was favorable to labor. I am wondering if, it being a Vermont case, the Senator's information as to the real gist of that holding comes from reading the decision of the Supreme Court or whether he has personal knowledge.

SENATOR AUSTIN. I represented the widow in that case.

SENATOR BURKE. And you presented the argument in the Supreme Court?

SENATOR AUSTIN. Yes.

SENATOR CONNALLY. This was a case where the Supreme Court was not against labor.

SENATOR AUSTIN. That is true.

The importance of the matter here, it seems to me, is this: That not only in Vermont, but in every other State where that rule with respect to burden of proof is in effect, in every other State in the United States from that decision on, labor had a load lifted from its shoulders.

MR. CROOKER. Another one, Senator, by the Supreme Court.

SENATOR LOGAN. Will the Senator from Vermont allow me to interrupt?

SENATOR AUSTIN. Yes.

SENATOR LOGAN. The statement the Senator makes would only apply to those States where they had a statute requiring the plaintiff to prove he was not guilty of contributory negligence. The Supreme Court would not follow the State court in matters of general law in such cases. If a State had a statute requiring the plaintiff to prove he was not guilty of contributory negligence, the Supreme Court would have to follow it, but in matters of general law the Supreme Court has held in favor of the defendant in such cases.

SENATOR AUSTIN. The syllabus, to use the term of the Senator from Texas, further states as follows:

"While matters of procedure depend upon the law of the place where the suit is brought, matters of substance in regard to an action based on a Federal statute depend upon the statute; and in an action under the Employer's Liability Act the burden of proof as to whether the employee was guilty of contributory negligence is a matter of substance and not of mere State procedure."

SENATOR LOGAN. That is true.

MR. CROOKER. Might I ask if the deceased was killed or injured in interstate commerce?

SENATOR AUSTIN. He was killed in interstate commerce.

MR. CROOKER. Therefore, the Federal Liability Act governed the case and not the State statute.

SENATOR AUSTIN. That is correct.

MR. CROOKER. The Supreme Court there held that the man being engaged in interstate commerce the Federal Employer's Liability Act governed to the exclusion of State law or rule of procedure, and made a very substantial advancement for workingmen by upholding that right.

SENATOR AUSTIN. That is correct. It relieved the workingman of the burden of showing he was free from contributory negligence.

MR. CROOKER. I am very sorry the matter had not come to my attention. If I say anything further on this subject, I should be very happy to add that splendid reinforcement to the other reasons why I say the Supreme Court has always been considerate of the rights of labor and the masses. . .

LETTER TO VOLUNTEER CITIZENS' COMMITTEE OF BOSTON

Influences Relied on to Secure Adoption of Proposal by Congress—If Passed, the Measure Will Widen the Limits of the Court's Present Narrow Legislative Activity by Requiring the Justices to Give New Interpretations to Accord with Political Pressure and by Directing Them to Apply the Social, Political and Economic Views of Others Rather Than Their Own—The Supreme Court Has not, as Charged, Arrogated to Itself Powers not Granted by the Constitution in Holding National and State Legislation Unconstitutional and There Is not a Single "Liberal" Justice Who Has not Concurred in Holding Legislation Void.*

By Arthur L. Corbin
Professor of Law, Yale University School of Law

THE President's plan for enlarging the Supreme Court is an executive direction to Congress to do something that the Congress itself would never have proposed, and something that was withheld from the people in the last election. It was at first supported by reasons that were not seriously believed to be sound and that have since been abandoned. If Congress adopts the proposal, its action will be due to the use of the power of patronage, to the party whip, and to executive command.

If the proposal is adopted, it will be a direction to the appointed justices to do as they are told. It can not fail to be understood, both by the Court and by the country, to be punishment for the past and a standing threat for the future. The proposal is almost as much a punishment of the so-called "liberal" Justices as of the more conservative ones. All of them concurred in holding N. I. R. A. to be unconstitutional, all of them expressed disapproval of the partial repudiation of the public debt, and most of them held other important legislation to be invalid.

The enactment of the President's bill would be a major step toward the creation of unlimited power in the President and Congress, or in one of them. Its purpose and its effect will be to make them the interpreters of the Constitution and the judges of their own power. The possession of unlimited power by the Executive and the Congress may be desirable. It may be desirable to reduce the Executive so as to be the mere agent of the Congress, removable at its will, as in England. But no such proposal has ever been presented to the American people for their adoption. It should not be adopted by indirection and without being aware of what we are doing. The President's proposal should not be adopted so long as we desire to maintain any constitutional limitation on executive and legislative power. The executive and the legislature do not merely decide cases brought before them; they take the initiative, they act upon the whole people at once, they execute and enforce, they control the distribution of funds, they control peace officers and the army and navy; to make them the interpreters of the limitations on their own power is to destroy the limitations.

In holding legislation, state or national, to be unconstitutional, the Supreme Court has not arrogated to itself powers not granted by the Constitution. There is not a single "liberal" Justice who has not himself concurred in holding certain legislation to be void. The opinions of Stone, Cardozo, Brandeis, and Holmes will all bear witness. The court has no veto on legislation, as the President has. It has no initiative in the cases that are brought before it. In all these cases, the Justices must determine the rights and privileges and immunities of the iitigants. These are determined by the Constitution as well as by acts of the Congress. The Constitution is the supreme law of the land; and the Justices, like the President and the Congress, have sworn to support it. It may be that some determinations by the Justices have been erroneous, and there need be no hesitation in public criticism; but they are far less likely to be erroneous, or to be motivated by group clamor or political pressure or private interest, than are similar decisions made by the President or Congress.

Do the social and economic views of the Justices affect their decisions on constitutional law? Within certain rather narrow, but very important

*Letter on the Supreme Court issue written by Mr. Corbin to Volunteer Citizens Committee of Boston.

limits they *do* and they *must*. The meaning and application of constitutional phrases can not be determined by mere processes of deductive logic or history or etymology. They have to be given meaning and application in the light of new and changing conditions. Like all other law, constitutions and statutes are subject to an evolutionary judicial growth. In this process, no judge can be unaffected by his social, economic, political and moral views. As to this, we should remember two things: first, that social and economic and political views influence "liberal" or "radical" judges as much as "conservative" ones, and very likely more; dissenting opinions are shot through with such views, just as much as are majority opinions. Secondly, the Justices of the Supreme Court have nothing personal to gain or lose—not salary, or position, or social prestige, or wealth. It is this that makes them more purely judicial than are any other persons in the world. They are sworn to interpret and to preserve constitutional government; in the judicial process, they must use logic and history and reason and honesty. In so far as this gives them legislative power (comparatively narrow in extent) their only motive in exercising it is to keep their sworn word and to leave a country of happiness and prosperity behind them. To get the benefit of their disinterestedness and wisdom, the Court must not be subjected to political pressure by the executive and the legislature.

The proposal that we are now discussing, if adopted, will widen the limits of the Court's legislative activity, will require the Justices to give new interpretations to accord with political pressure, and will direct them to apply the social, economic and political views of others rather than their own. This will be true whether the legislation that is involved is "progressive" or "reactionary." Worst of all, this direction to the Justices will be accompanied by direct rebuke as to specific decisions, by public humiliation through charges of senility and dishonesty and usurpation, and by deprivation of power both by diluting the Court with new members and by legislation to prevent the hearing of appeals.

Have the recent decisions of the Supreme Court been more greatly influenced by the social and economic and political views of the Justices than previously? Very probably not. The chief difference between recent history and earlier is due to the fact that the Court has been bombarded with a greater volume of legislation the avowed purpose of which was to affect matters not previously dealt with by Congress. Also, there has been a comparatively short period during which no changes have been made in the personnel of the Court. The views of the individual Justices have tended to harden with frequently repeated expression, and for the same reason have become more generally known.

A few years ago, decisions were likely to be made by a divided Court of six to three, the dissenters being Holmes, Brandeis, and Stone. The dissenters were sometimes joined, however, by Chief Justice Taft, as in the first Minimum Wage decision. On the purely constitutional aspects of these decisions, the present writer was practically always with the dissent; but he was never inclined to accuse the majority of either dishonesty or senility.

The last three appointments to the Court, made in the customary manner, without effort to pack the Court as to pending constitutional issues, and merely with the purpose of getting the benefit of the best judicial minds in the country, have resulted in turning the former minority of the Court into a majority, on most of the debatable constitutional issues. As to legislative power over the Minimum Wage, the Adkins case has been overruled; the Wagner Labor law has been sustained; there is no barren and dangerous "no-man's land" between federal and state jurisdiction. New appointments to the Court, that must be made in the ordinary course of events within a reasonably short time will, to a certainty, strengthen the position of the present Court majority. How short-sighted and foolish it is to adopt the proposed measure, weakening the independence of the Court and lessening respect for its decisions, whether because of political resentment or because of impatience with constitutional limitations upon executive and legislative power!

That there are many undoubted and unavoidable limitations upon national power, no one can deny. That N. I. R. A. fell outside these limits, every Justice of the Supreme Court agreed. Even if six respectable lawyers could be found who would agree to vote the other way if they should be made new members of the Court, the limits on national power would still exist. No honest man could decide that "interstate commerce" includes all the transactions of life, or that the power to tax and spend "for the general welfare" empowers Congress and the President to do anything that they choose to say is for the general welfare. It is highly improbable that a court of fifteen Justices would interpret those phrases of the Constitution much more broadly than five Justices have done in relation to the Wagner Labor Act. If there is necessity for still further extensions of national power, such extensions should and must be made by straightforward amendment, and not by diluting our greatest tribunal with men who will interpret and decide as they are told, and who will thus intentionally expand legislative and executive power beyond the limits that are recognized by such liberal statesmen as Hughes, Brandeis, Cardozo, Roberts and Stone.

Yale University Law School, May 1, '37.

PRESIDENT'S PROPOSALS WITH RESPECT TO THE FEDERAL COURTS*

Plan to Change the Character of the Supreme Court Is not a "Liberal" Movement, as Evidenced by the Position Taken by Men Who Have Sponsored Social Reform All Their Lives and Who Are Now Militantly Opposed to the Bill—No Mandate from the People—What Might Happen Under the Provisions of the Act Dealing with the Assignment of Judges from One Circuit or District to Another—Unfounded Nature of Charge That the Supreme Court Has not Been Sufficiently Responsive to Defeated Litigants Who Seek a Review of Adverse Decisions—A Change in the Present System Would Work in Favor of the Wealthy and against the Poorer Litigant—The Problem of Congestion in the Federal Courts, etc.

By Hon. John C. Knox

Senior Judge of the Southern Federal District of New York

IN appearing here to argue in opposition to the proposed legislation now engaging your attention, I wish to say immediately that not only am I not antagonistic to many measures advocated by the administration, but I am definitely in favor of their enactment into law. But my enthusiasm for these objectives of the President is not sufficiently great to cause me to desire them at a cost that will impoverish the prestige, independence and moral integrity of the judicial branch of the government.

As a member of an inferior federal court, I have had occasion to know the disappointments that come to one when he is made aware that his opinion and conscientious beliefs have been disregarded by the Supreme Court of the United States. More than once that tribunal has seen fit to reverse my official judgments and decrees. Hence, I am not prepared to say that the Court is always right. Its action, in some of my cases, has been a source of keen personal regret. As much may be said of some of its decisions in which my only interest was that of a citizen, who fervently wishes the happiness and welfare of his country. But, great as has been my disappointment as respects some of the conclusions reached by the Court, I refuse to condemn its personnel as unpatriotic, and unfitted for the proper discharge of judicial functions. The court is human. Being such, it is not infallible. And, if there be a change in the personnel of the court, the men who succeed those who now sit upon the bench will soon be rightly charged with the commission of error.

Limitations of humanity, when they manifest themselves in the judiciary, should be as indulgently condoned as those that now and again are exhibited in the actions of legislators and executives.

Having been a judge for many years, I have first hand knowledge of the doubt, misgiving and uncertainty—may I say the vacillation of mind—that often are experienced by a man, who, in a close case, must adjudicate a public or private dispute. It has been my privilege to sit in an appellate court. My temporary rank of the superior quality was unaccompanied by the endowment of an infinite mind. Nor did I find that my colleagues were so possessed.

The members of the Supreme Court, being men having finite brains, differing backgrounds and environments, as well as varying predilections of thought, often find difficulty, I dare say, in reaching results that are wholly satisfactory to their associates, the public, or themselves. However, they must arrive at decisions, and when the court has given careful, honest, conscientious and independent consideration to matters pending before it, the result of the effort is all that can reasonably be expected, and the pronouncements of judgment are entitled to respect and confidence.

Having some acquaintance with the judicial process, my wonder is not that men who sit in our highest appellate courts often find themselves sharply divided in opinion, but that they are, so frequently, in entire accord. Differences of view upon the part of able and upright judges are inevitable in decisions of legal controversies. This is particularly true when they are required to pass upon questions of constitutional law, and more especially, when these questions arise out of emergency legislation which, if necessary, should go,

*Statement before the Judiciary Committee of the United States Senate on April 13.

and which, no doubt, has gone to the outermost edge of constitutional authority. Admirable as is the charter of the American government, the boundary lines between what is, and is not, authorized, are not always plainly visible. The meaning of words, however carefully selected, can neither be accurately measured by rule nor mathematically weighed. In many instances, the words used in writing the Constitution were chosen as a result of political compromise and expediency. Their full scope and meaning, their implications and significance, were subjects of debate in the Conventions that promulgated the Constitution, and disputes concerning them have marked our entire political history. Why, then, when men of strong, able and individualistic minds go upon the Supreme Court, should we expect their decisions of constitutional questions to be unanimous? The Court has never been, and unless controlled by an outside influence of dominating quality, never will be, in all cases, without dissent among its members. The man upon that bench who chances to create the majority that gives vitality to a point of view, cannot, in any fair sense, be regarded as a judicial despot. Without the concurrence of four other votes, that of a man who determines a particular decision can be, as respects a policy of government, decisive of nothing. In a country that firmly believes in rule by majorities, and in a land where many important issues have been decided by the narrowest of margins, we should have done, I think, with the thought that the closely divided judgment of an honest and independent court is an abomination that no longer is to be tolerated.

But, it is said, some of the justices of the Supreme Court peer into the darkness of the night that is gone rather than into the face of the dawn that now breaks about us. If the truth of this charge be assumed, there can be no complete certainty that younger men, when elevated to the bench, will not give voice to tenets like unto those spoken by their predecessors in office. All of us, I take it, from our observations of our contemporaries, and from our reading of history, can call men to mind who, in their youth, believed in dogma of the quality of that of bourbonistic conservatism, and who, as the years went by, took no real note of changes in conditions about them. Other men, whose views were conservative in early life, mellowed with the years, and became leaders of movements of liberal tendencies. All this, of course, means only that a man's true character and innermost nature will never be really disclosed until his actions reveal them to the world. Liberals, sometimes, as well as conservatives, can rightly be accused not only of the possession of intolerant spirits, but of bigoted minds as well.

In giving thought as to what should be done with the bill at hand, it should be remembered that our social and economic problems did not creep upon us in the night. Indifference and other causes allowed them to accumulate over many years. Unfortunately, these problems are incapable of solution within a brief space of time. The consummation of the President's plans for an improvement in national affairs, speaking relatively, will be but slightly delayed, and comparatively little suffering will be felt by the beneficiaries he has in mind if, before an independent judiciary be destroyed, the people of America are given opportunity to express their will as to whether that destruction shall be accomplished. Let us be sure that our ailments are not alleviated by a process of cure that may be productive of more intense distress than that which now afflicts us.

In this controversy concerning the Supreme Court, there is no true issue between so-called "liberals" and "reactionaries." The word "liberal" is an adjective, and not a noun. Unless it be employed in connection with a specific object, it is hardly more than a political catchword. The word belongs to no particular party or group of individuals. That the proposal to change the character of the Supreme Court should not properly be characterized as a liberal movement is evidenced by the position taken by men who have sponsored social reform for all their lives, and who are now militantly opposed to this bill. Furthermore, when giving consideration to the attitude of mind of so-called liberals, as respects the President's proposal, one should determine whether, to them, liberalism is a way of life, or a mere party emblem. The opinions of the latter class are entitled to less consideration than those of the former. Incidentally, the most specious argument that has been advanced for the so-called reformation of the court is that the measure should be supported out of loyalty to a party. As a Democrat who refuses to be read out of his party because of his stand upon the issue before you, I say that the argument that party regularity should affect the outcome is unworthy of discussion. So far as I can observe, the real issue is whether certain reforms, presently considered to be desirable of attainment, shall be secured in an orderly, constitutional procedure, or through a program which, if not unconstitutional, is definitely and positively anti-constitutional. As citizens of a free state, let us be careful that through specious reasoning and fallacious argument we do not create a situation whereby our judicial establishment will be rendered akin to those that are to be found in certain foreign lands whose example we have no wish to follow.

A typical argument against the use of the amending process is that the Administration has a mandate from the people. I should like to say, point blank, that when I voted for Mr. Roosevelt, it never occurred to me that I was contributing to

any such mandate. Likewise, point blank, I want to declare that if this issue had been clearly presented in the campaign, the President would have been denied my vote. Furthermore, I point to the message which accompanied this bill. It makes no pretense that the people ever had an opportunity to consider the proposal. In fact, I know one man who campaigned for the administration. He has told me of his embarrassment when, during the canvass he was asked how various ends would be achieved in the light of certain decisions of the Supreme Court. He reports that he generally glossed over the problem. Such too, I think, was the approach made to the people throughout the entire Democratic campaign. Men who worked valiantly to elect the President never were advised of the bill that now agitates the country.

The contention is also heard that a constitutional amendment is unnecessary. To be sure, the Constitution, in some aspects at least, and because of its vagueness, is what the judges say it is. But the duty of interpreting and applying the Constitution rests upon the judges. Unless they be relieved of that duty, they must continue to act as best they can. Even the present program contemplates no changes along that line. When the exercise of this duty of interpretation becomes necessary, it is obviously better for the commonweal that judges, in their approach to the problem, should be entirely free from extraneous influences. Of course their rulings on specific points will not always be agreeable to some people, but on other questions, their decisions are usually satisfactory. Hence, I submit that the subject matter of the decision and not the judges, should be changed. When the courts construe a statute in a manner not satisfactory to the Congress, the subsequent change is in the statute and not in the judge. If the adverse ruling arises out of an ambiguity in the statute, the ambiguity is removed. The same approach applies to ambiguities in the Constitution. If our present condition must be termed a crisis, then it is constitutional and not judicial, and should be met in the manner we have all been taught to and have a right to anticipate.

Passing now to a feature of the proposed bill that seems not to have been particularly stressed in the hearings had before your Committee and which, in my opinion, is almost as objectionable as that having to do with the Supreme Court, I call attention to provisions of the act dealing with the assignment of judges from one circuit or district to another. If the new circuit and district judges, who come to power under the plan of the President, are to be selected because of their young blood and forward looking ideas, the bill now under consideration exhibits a consistency of purpose that is of sinister aspect to every man who, upon principle, is opposed to the use of stacked decks of cards.

Under the terms of Section 2 (a) of the pending bill, the only circuit and district judges whom the Chief Justice can assign to sit within circuits and districts other than their own are those who are "hereafter appointed." This means that judges now on the benches of the inferior federal courts, whatever their capacities, and irrespective of the congestion of calendars that may obtain in particular jurisdictions, are unavailable for use in relieving the distress that may there exist. What good reason can be advanced for the exclusion from needed service of men who, for years, have demonstrated ability and impartiality, and who are qualified by experience to discharge any judicial task that may come before them? If I were asked to answer the question that has just been propounded, I should reply that, without further information from the proponents of the bill, there is a possibility that somewhere there is some one who fears that judges heretofore appointed will not be amenable to suggestions as to how particular cases should be decided.

Under the law, as presently written, a district judge cannot be transferred outside the circuit which includes his district without the concurrent action of the Chief Justice of the United States and the Senior Circuit Judges of the circuits that are directly affected. In other words, three men, holding high position, must agree to the transfer of a district judge to a district lying without his circuit of residence. Under the law that is proposed by the administration, the transfer not only of a district, but of an intermediate appellate judge, provided he is "hereafter appointed" can be accomplished by the ipse dixit of the Chief Justice alone.

By an arrangement such as this let us take note of the full significance of what can conceivably be done. Section 22 of Title 28 of the United States Code, annotated, so far as material, reads as follows:

> "The Chief Justice of the United States, or the circuit justice of any judicial circuit, or the senior circuit judge thereof, may, if the public interest requires, designate any circuit judge to hold a district court within such circuit . . ."

Section 23 of the same title provides that

> "It shall be the duty of the district or circuit judge who is designated and appointed under either of sections 17 to 22 of this title, to discharge all the judicial duties for which he is so appointed, during the time for which he is so appointed; and all the acts and proceedings in the courts held by him, or by or before him, in pursuance of said provisions, shall have the same effect and validity as if done by or before the district judge of the said district."

The effect of these statutes is that a judge selected pursuant to their authority may be designated to discharge a specific judicial duty. See Johnson v. Manhattan Ry. Co., 289 U. S. 479. As a result of these laws and the one you are now considering, if it shall be enacted, a shocking situation can be created. I make no prophecy that it

will ever come into being. I merely call attention to what is within the range of possibility if ever we have an administration that wishes to take full advantage of the authority for which the President now supplicates the Congress. To illustrate the point I wish to make, let us suppose this state of facts:

This afternoon I finish the trial of a suit that has come before me. I send for the Calendar Commissioner and ask him the assignment that I shall have in the morning. He tells me it will be a case between the United States and John Citizen and that it involves the construction of a recent Congressional enactment in which the administration is keenly interested. I recognize the litigation as one which has been widely heralded, and that it is regarded generally as a test suit under a law that is designed to help the needy and supply security for the underprivileged. I pick up the statute with which the action is concerned, and procure the pleadings of the litigants. These are placed in my portfolio, and I take them home in order that they may have preliminary consideration. On my way uptown in the subway, I look at the evening paper and see that a Special Assistant to the Attorney General has arrived in the city, and that he is to represent the Government in the case I am to try. I think the litigation will be not only interesting, but important. In preparation for what may eventuate on the morrow, I spend part of the night in study of the questions that are likely to arise.

When morning comes, I go to my courtroom. As I prepare to step upon the bench, and engage in the trial of the cause, I am confronted by a man I never saw before. Introducing himself, he tells me that he is a recently appointed judge from a district in the north, south, east or west, and that he has been specially assigned by the Chief Justice to try the case of the United States against John Citizen. Notwithstanding that I am still a considerable distance from a condition of senectitude—though it be that I think I am of liberal thought—irrespective of the fact that I have had a judicial experience of nineteen years, and enjoy some measure of confidence in my home community, I am, so far as this particular case is concerned, functus officio, and must retire from the scene. The evening papers record the episode, and thereafter, the public watches the proceedings in the court with lively interest. At the conclusion of the trial, the presiding judge directs a verdict in favor of the government. Perhaps he should have done so, or perhaps he should have decided the case in favor of the defendant. The issue is close, and competent observers have conflicting views. But, in any event, what happens? The defendant takes the suit to the Circuit Court of Appeals. Upon his appearance in that tribunal, he finds upon the bench a man of whom he has never before heard. Making inquiry, the defendant learns that the newcomer is a recently appointed Circuit Judge who has been specially assigned to the appellate court of my circuit. Argument is heard, and, in due time, let us assume, the judgment of the lower court is affirmed, the deciding vote being cast by the judge from another jurisdiction. Once again, the newspapers comment upon the result and call particular attention to what has been done by the two judges from other sections of the country. Cynics smile knowingly, and a guarded editorial or two appears in the press.

John Citizen, being a litigious fellow, asks the Supreme Court for a write of certiorari, and is surprised when he finds it granted. At this point he employs special counsel. No advantage that can be obtained in the court of last resort can be overlooked.

In the course of time, the case is reached for argument in the edifice up the street. Six justices who now occupy seats upon the bench are absent. Being unable longer to withstand the storm of innuendo, abuse, ridicule, villification and calumny that has blown against them, they have retired to private life where—at leisure—they may meditate upon the ingratitude of a republic. In their places sit six young men—dark haired, smooth-faced and inexperienced in judicial work. They hear the case which John Citizen presents—they listen to the Assistant Attorney General—and three weeks later the Government wins. John Citizen has had his day in court, and a statute of doubtful validity has been sustained. Perhaps, as I suggested a moment ago, it should have been sustained. But, granting this to be true, what will be the effect upon the public mind? Nothing less than that the federal courts from top to bottom have been packed in order to serve the purposes of the administration that happens to be in power. Never again will the courts enjoy public confidence and respect. Their protestations of virtue and fair dealing, together with the proclamations of the courts proctor—an official who because of duties assigned him in other countries, is suggestive of forms of government that make no appeal to me—will be as sounding brass and tinkling cymbals. The confidence, respect and security that a free people have felt in their judicial establishment for a century and a half, will have been dissipated. In their stead, there will be an abiding fear and apprehension in the minds and hearts of our citizens that a day of judicial tyranny and oppression is at hand.

So far as the Southern District of New York is concerned, I desire that it should never for any purpose whatsoever be beleagured by a flying squadron of judges who, perhaps, under some conditions, might properly be classified as privateers.

In my judgment, the importance of maintaining the unimpaired strength of an institution that, irrespective of its faults, has proved its worth and

capacity in a hundred crises, rises superior to any temporary advantages that may be secured through the medium of its emasculation.

If the people of the United States are desirous that the potentialities for evil that I have described should be rendered possible, I shall reluctantly, but loyally, submit to their will. If national exigencies call for results that cannot now be achieved, the needs of the nation must certainly be recognized. But, if the benefits of these needs are to be enjoyed, let them come under specific grants of authority instead of bringing them into being by indirection, devious methods and tortuous ways. Statecraft demands frankness and sincerity in policy, method and purpose. The absence of specific authority to accomplish a particular result does not justify resort to a phantom power that disingenuous reasoning may capture but which is not clearly tangible, and that, so far as can be ascertained, was never contemplated by the founders of our government.

If obedience to court orders is to be had, the persons affected thereby must recognize them as the products of tribunals that are, to use the century old words of Oliver Wolcott, "independent of party, independent of power and independent of popularity."

An argument advanced by the proponents of the President's bill is that the Supreme Court has not been sufficiently responsive to defeated litigants who seek the review of adverse decisions through the medium of writs of certiorari. Realizing, as I do, that the members of this Committee either are, or have been, practicing lawyers, it seems unnecessary to dwell on this phase of legal procedure. You know, as well as I, that the great mass of cases decided by a court of first instance are unworthy of review by an appellate court. As a practical proposition, in such cases as should be reviewed, the Circuit Courts of Appeals are competent to render substantial justice, and, with rare exceptions, do so with alacrity. In these exceptionable cases, I think an examination of the records of the Supreme Court will show that that tribunal seldom fails to grant a writ. Instead of being criticized for a failure to review all the cases in which litigants seek the judgment of our highest tribunal, the court should be commended for the course of conduct it now pursues.

Parties litigant have their day in court when they try their case in a tribunal of first instance. The primary purpose of the process of appeal to a court of last resort is to secure harmony of decision and the settlement of important questions of law. It is unfair to imply that justice has necessarily been denied where a party, in an ordinary case, cannot carry an appeal to the Supreme Court. If a verdict by twelve men, as regards a question of fact, is to be regarded as sacrosanct, it would seem that, as respects law questions that most frequently arise, the judgment of one appellate court should be sufficient to assure the rendition of justice. If the country be constantly supplied with competent courts of intermediate appeal, the extensive use of certiorari will be unnecessary. Furthermore, it has been conclusively demonstrated that a larger Supreme Court will tend to diminish rather than increase the number of writs granted. I suggest that the proponents of this act read Rule 38, paragraph 5, of the Rules of the Supreme Court which fully delineates the Court's position. The Court has frequently stated that petitions for writs of certiorari, including the records, go to every member of the court for consideration and are then separately considered in conference.[1] Both Mr. Justice Stone and Mr. Justice Brandeis have stated that such petitions are always granted when four of the nine justices believe such action should be taken.[2] May I also bring to your attention that in the State of New York the right to appeal is far more constricted than in Federal Courts. However, I am far from an authority on Jurisdiction of the New York Court of Appeals, and so I suggest you investigate for yourself Article 38 of the New York Civil Practice Act.

If all cases decided by the Circuit Court of Appeals were to be considered by the Supreme Court, it would be overwhelmed by a mass of litigation quite beyond the physical capacities of many more than fifteen justices, however young and vigorous they might be. Justice would be insufferably delayed and as all of us must admit, "justice delayed is justice denied."

But, there is another consideration. All of us are familiar with the disposition of wealthy litigants to fight all cases to the final courts of appeal for the sole purpose of harassing and exhausting poverty stricken adversaries. It is safe to say, I think, that a very substantial portion of the suits on the common law side of the court for my district are personal injury actions in which railway employees and sailors are plaintiffs. Their causes of action are their only assets. Many plaintiffs are upon the relief rolls, and an early disposition of their causes of action is the division line between actual want and half way decent living. In these classes of litigation, the law has long since been settled. From a realistic standpoint, therefore, it is simply preposterous to contend that a railway or steamship corporation is being deprived of a substantive right because the Supreme Court is unsympathetic to their petitions for writs of certiorari. There is no justification for enabling these corporations by a species of legal legerdemain to hold off worthy claimants in order to force them into ac-

1. Address by Mr. Justice Hughes reported in 34 A.B.A.J. 341; Address of Mr. Justice Stone in 14 A.B.A.J. 428; Furness, Withy v. Yang Tze, 242 U. S. 430; Rule 38, Par. 7.

2. Mr Justice Stone, supra, note (1); Hearings, 1935, on S 2176, 74th Cong., 1st Session, pp. 9-10.

cepting inadequate settlements. In all such cases, appellate review should positively be discouraged.

Being somewhat familiar with the problem of congestion in the federal courts, I should like to give this matter a moment of consideration.

In October, 1936, the Judicial Conference, composed of the Chief Justice, and the Senior Circuit Judges of the ten circuits within the land, reported that "in 51 out of a total of 85 judicial districts the business of the district courts is current, that is, all cases ready for trial are disposed of at the term following joinder of issue." After pointing out the great improvement in calendars that took place subsequent to June, 1934, and also setting forth current conditions of certain divisions or classes of business in other districts, the report continued:

"It is thus apparent that the question of delays in the hearing of cases is one that should be considered with respect to particular districts. The Conference in recent years repeatedly called attention to the serious congestion and delays that were found in the Southern District of California and in the Southern District of New York and recommendations were made for the appointment of additional district judges. These recommendations have been followed by the action of the Congress and important gains have been made. In the Southern District of Califorina, as reported by the Attorney General, the average interval between joinder of issue and trial in ordinary course has been reduced from 18 to 8 months. It is hoped that the recent appointment of additional judges in the Southern District of New York will lead to a similar improvement. Further assistance, by special designation, for the Southern District of New York is also rendered possible by the appointment of an additional judge for the Eastern District in that State."

Thus, it is obvious that the congestion alluded to by the President and the Attorney General is not general throughout the country, but, on the contrary, is highly localized. Senator Wheeler has stated:

"In only four of the Federal courts that are behind in their work is there a judge over the age of 70 years. For many months there have been nine vacancies in the Federal courts, and notwithstanding the Attorney General's alleged concern with 'law's delays' these vacancies have not been filled."

I happen to be the Senior District Judge in the Southern District of New York, which is one of the districts that has lately been behind in its work. With respect to this condition I can speak with authority. The reasons for crowded dockets in the Southern District of New York are entirely obvious. That district is not only the greatest population center upon the continent, but is also the leading commercial center of the world. Practically all of the large corporations have offices, and are subject to process, in this jurisdiction; generally, for reasons satisfactory to themselves, counsel for such corporations, if at all possible, remove actions to the Federal courts. Thus, the court is burdened with many simple cases which could just as well be disposed of in state courts. Furthermore, New York is America's foremost maritime port. Hence, a large proportion of all admiralty cases are brought in the Southern District. In addition, most of our litigations are of protracted length, particularly in mail fraud cases. These frequently consume six to eight weeks of trial.

An historical perspective will be of aid in understanding the present problem. Statistics for the year 1860-1920 are presented in the note.[3]

The social and economic upheaval following the World War is clearly indicated in the figures for 1920. During the twenties the volume of business increased tremendously. At the time of my appointment to the bench in 1918, this district had only three other district judges. Naturally the huge increase of litigation just about swamped the court, yet no new judgeships were created until 1923, and my district was awarded two. Several years later it acquired two more judges. Unfortunately, I do not have at hand the statistics for the ensuing decade although they are available and will be put at your disposal if that be desired. Coming down to the present, therefore, allow me to submit the following table prepared by the office of the Clerk of the Court and reprinted in the margin.[4] Thus it will be obvious the trend is toward all calendars being current. I believe this trend will continue. In the first place the heavy pressure of prohibition cases has been removed, al-

3. CASES BEGUN IN DISTRICT AND CIRCUIT COURTS, SOUTHERN DISTRICT OF NEW YORK, IN THE YEARS GIVEN:

	1860	1870	1880	1890	1900	1910	1920
ADMIRALTY	245	255	525	408	423	384	1,904
LAW	120	151	185	162	405	346	1,215
EQUITY	93	369	509	196	319	607	1,405
CRIMINAL	75	153	95	82	92	405	2,740
APPEALS and MISCELLANEOUS MATTERS	10	126	61	70	8	38	346
	543	1054	1375	918	1247	1780	7,610
Bankruptcy	...	292	....	...	1378	1346	1,503

4. CONDITION OF TRIAL CALENDARS AS OF APRIL 10, 1937

	Jury	Equity	Admiralty	TOTAL
On Calendar June 30, 1936—	1286	755	133	2174
Added since (up to and including April 10, 1937)	565	367	222	1154
Terminated since (up to and including April 10, 1937)	1052	353	188	1593
On calendar April 10, 1937	799	769	170	1738

DATES OF ISSUE OF HIGHEST NUMBER REACHED IN REGULAR ORDER

	Jury	Equity	Admiralty
As of June 30, 1936	Dec. 20, 1934 (19 months)	Oct. 30, 1934 (20 months)	June 10, 1936 (20 days)
As of April 10, 1937	Apr. 9, 1937 (up to date)	July 24, 1935 (20 months)	Feb. 10, 1937 (63 days)

NOTE: The above statement shows the estimated time it will take for a case to be reached for trial. There are still untried the number of cases shown in the report of the "Condition of Trial Calendars."

HIGHEST NUMBER REACHED IN REGULAR ORDER

October 5, 1936*	Jury 300	Equity 146	Admiralty 131
April 10, 1937	Jury 1851	Equity 350	Admiralty 324

HIGHEST NUMBER PLACED ON PERMANENT CALENDAR

April 10, 1937	Jury 1851	Equity 1094	Admiralty 358

though prosecutions for liquor law violations still abound. Bankruptcy proceedings will probably decrease. Furthermore, after some delay, the appointment of three new judges in this district has been consummated, making eleven in all. Without doubt, our calendars would never have gotten into the condition they were in a year ago had advantage been taken of the power to appoint new judges and had an authorized judge been appointed with reasonable promptitude. Even now, and although our calendars are rapidly being brought up to date, we still resort to the services of visiting judges. For what they have done to help us, I wish to express grateful thanks. However, this source has limited scope. Naturally, judges from without the Southern District are usually unwilling to take assignments for the trial of admiralty and patent cases. Accordingly, their activities, generally speaking, are confined to common law and criminal calendars. In considering the aid to be had from visiting judges, one must take account of the personal sacrifice they must undergo in order to accommodate my court. For example, the stipend that may be allowed for their expenses is but $5 per day. Those of you who have visited New York will realize that a temporary resident in that city cannot live, even modestly, on such an allowance. Thus it is that the aid to be expected from non-resident judges cannot alter conditions in my district unless service therein be made somewhat more attractive. At the last Congress, an effort was made to relieve out of town judges of the necessity of paying a part of their expenses from their own pockets. The method adopted was to increase the allowance for subsistence to ten dollars per day. What happened? The President of the United States vetoed the bill.

You may rightly infer from what I have said that the delays of justice in my district are mainly attributable not to the judicial branch of the government, but to other agencies of the nation.

One more word, and I shall have concluded. It is that while I believe in majority rule, one must take cognizance of the fact that time has more than once demonstrated that a majority's convictions as to utimate truths are sometimes grounded upon falsity. Our own party system and the frequent oscillations of power from one to the other, are evidence that the nation's ideas of policy, propriety and desirability of particular measures are open to sudden change and overthrow. Opinions of the Supreme Court, rendered in times gone by, have brought heaping criticism upon the judges who pronounced them—and yet, following generations have given those opinions their benedictions. This nation's record in the way of preserving civil liberties is not beyond improvement. But, for such portion of the record as is good, the Supreme Court of the United States, above any and all other agencies, is entitled to credit for standing four square to every gust of passion, and to each storm of expediency, that have swept our people from off their feet. When we are confronted with spectacles in which, in some portions of the country, candidates peaceably campaigning for public office are denied the privilege of communicating their ideas to their fellow citizens; when examples have been set as to the willingness with which our people occasionally impose upon religious and racial minorities, and when minorities, by concerted and unlawful actions, inflict untold injuries upon majorities, it would seem that the spirit that has maintained the government, as originally constituted, throughout all its necessities, should now unreservedly maintain the anchorage to which our liberties are moored.

I commend for your consideration the following statement by Mr. Justice Cardozo, taken from his "The Nature of the Judicial Process" (pages 91-94):

"Some critics of our public law insist that the power of the courts to fix the limits of permissible encroachment by statute upon the liberty of the individual is one that ought to be withdrawn. It means, they say, either too much or too little. If it is freely exercised, if it is made an excuse for imposing the individual beliefs and philosophies of the judges upon other branches of the government, if it stereotypes legislation within the forms and limits that were expedient in the nineteenth or perhaps the eighteenth century, it shackles progress, and breeds distrust and suspicion of the courts. If, on the other hand, it is interpreted in the broad and variable sense which I believe to be the true one, if statutes are to be sustained unless they are so plainly arbitrary and oppressive that right-minded men and women could not reasonably regard them otherwise, the right of supervision, it is said, is not worth the danger of abuse. 'There no doubt comes a time when a statute is so obviously oppressive and absurd that it can have no justification in any sane polity.'[1] Such times may indeed come, yet only seldom. The occasions must be few when legislatures will enact a statute that will merit condemnation upon the application of a test so liberal; and if carelessness or haste or momentary passion may at rare intervals bring such statutes into being with hardship to individuals or classes, we may trust to succeeding legislatures for the undoing of the wrong. That is the argument of the critics of the existing system. My own belief is that it lays too little stress on the value of the 'imponderables.' The utility of an external power restraining the legislative judgment is not to be measured by counting the occasions of its exercise. The great ideals of liberty and equality are preserved against the assaults of opportunism, the expediency of the passing hour, the erosion of small encroachments, the scorn and derision of those who have no patience with general principles, by enshrining them in constitutions, and consecrating to the task of their protection a body of defenders. By conscious or subconscious influence, the presence of this restraining power, aloof in the background, but none the less always in reserve, tends to stabilize and rationalize the legislative judgment, to infuse it with the glow of principle, to hold the standard aloft and visible for those who must run the race

(*Continued on page* 463)

1. Learned Hand "Due Process of Law and the Eight Hour Day," 21 Harvard L. R. 495, 508.

THE SUPREME COURT AND THE PRESIDENT'S PROPOSAL

Fundamental Question Is Whether Our Federal Government Can and Will Enact Laws to Correct the Existing Evils in Our Social and Eonomic Systems—President Roosevelt's Madison Square Garden Speech Was a Frank Avowal of His Objectives, Set before the People for Approval or Disapproval Notwithstanding What the Supreme Court Had Said—There Can Thus Be No Doubt as to the Objectives for Which They Voted—President's Plan for Reorganization of Supreme Court Advocated because It Seems Only Practical Way of Remedying Evils Which Threaten Continuance of Our Capitalistic System and Democratic Form of Government, etc.

By Theodore Francis Green

Member of Rhode Island Bar; U. S. Senator from Rhode Island; Member of Council on Legal Education of American Bar Association

THE fundamental question is whether our Federal government can and will enact laws to correct the existing evils in our social and economic systems. In this land of abundance millions of our fellow citizens are destitute and many more millions are very poor and face the future with an uncertainty almost hopeless. The measures planned to help them may be summarized under the popular term "The New Deal". This help is proposed not only on humanitarian grounds, but also on the grounds that only by such measures can our capitalistic system and our democratic form of government be preserved.

There are many who do not recognize any obligation on the part of the Federal government to remedy this condition. They naturally are glad to believe that the government cannot do this under our Constitution. There are some others who believe such action would be desirable but also believe that the government is powerless because the Supreme Court says it is. The desirability of doing this is one thing and the power to do it quite another, though the two are often confused even by lawyers and judges.

Last Fall there was a national election at which the people elected a President and a third of the Senate, and a half of the House of Representatives as well as many governors and other state officers. The people elected in the main those candidates who, they believed, stood for the political philosophy known as "The New Deal". They elected them by an overwhelming vote, which reaffirmed more strongly their definite purpose similarly expressed at two preceding national elections. If anyone doubts this, I suggest that he reread the President's Madison Square Garden speech just before the last election and study the objectives therein set forth in the light of what the Supreme Court had decided up to that time. Fairly construed, I think it was a frank avowal of those objectives, which then and there were put before the voters for approval or disapproval, notwithstanding what the Supreme Court had said. In the light of the election returns there can be no doubt as to the objectives for which the people voted.

It is the duty of the President, the Senators and the Representatives so elected to try to carry this will of the people into effect. The National platform on which they stood stated: "We have sought and will continue to seek to meet these problems through legislation within the Constitution." This meant that amendment of the Constitution was to be tried only as a last resort, if all means within the Constitution failed.

Our government is a representative democracy. The people decide general principles and general objectives and elect their representatives to decide on the best means of applying those principles and attaining those objectives. So in this instance the people decided in favor of the general principles of the New Deal and elected us to decide how best to carry them into effect. That is our mandate, binding not on the President alone, but as well on all those elected with him on the same platform. The only question then we should debate is how we can best accomplish this. We should no longer debate whether it ought or ought not to be accomplished. It is no time for an appeal from the result of these three national elections by those who at these elections advocated another political philosophy, or perhaps it would be more accurate to say "by those who opposed this philosophy and advocated no other." Yet we now find all of these who then were its opponents, and a few of those who then were

thought to be its advocates, seeking to reopen the whole question anew.

Whatever any others elected on a New Deal platform may conceive to be their duty, and I do not question anyone's honesty, I conceive it to be my duty to carry out that mandate. I advocate the plan for reorganization of the Supreme Court proposed by the President because, by the process of elimination, I see no other practical way of carrying out the principles of the New Deal, and coming to the relief of a distraught people, and remedying the evils in our social and economic systems which threaten the very continuance of our capitalistic system and our democratic form of government. I have been asked to tell you why I came to this conclusion! At the same time let me say that I think there is room for honest difference of opinion and no occasion for questioning the sincerity or patriotism of those who differ.

The drafters of our Federal Constitution conceived our Government as consisting of three departments, the legislative, the executive and the judicial, with their respective powers so defined as to balance each other. The plan was so well conceived that any disturbance of that balance is to be avoided if possible. The present crisis results in part from the narrow construction of the Constitution by certain of the judges, and in part from the resulting encroachments of the judicial on the legislative department.

The founding fathers did not intend the Supreme Court to pass upon the wisdom of legislation. At the convention at which the Constitution was drafted it was urged by James Wilson that the Court should have this function, but this proposal, though supported by Madison and by Ellsworth, was emphatically voted down. Yet today we find the Court doing precisely what the Constitutional Convention specifically refused to permit it to do! It is passing on the wisdom of legislation.

A few years ago Mr. Justice Holmes in a dissenting opinion expressing his anxiety at the ever increasing scope given to the 14th amendment said, "I cannot believe that the amendment was intended to give us carte blanche to embody our economical or moral beliefs in its prohibitions. Yet I can think of no narrower reason that seems to me to justify the present and the earlier decisions to which I have referred." We find hope for a changed court attitude in the language of Mr. Justice Cardozo in the majority opinion just handed down upholding old age pensions legislation when he said, "Whether wisdom or unwisdom resides in the scheme of benefits set forth in Title II, it is not for us to say. The answer to such inquiries must come from Congress, not the courts. Our concern here as often is with power, not with wisdom." That view, however, has not won general acceptance among the justices as is shown by the dissents on the part of four out of the present nine justices who, come what may, are opposed to the social philosophy that prevails in the United States today. These four justices, all of them over 70 and three of them over 75, hold to a different philosophy, and seek to write their philosophy into the constitutional law of the Nation. One of the four has just resigned, but apparently the other three want to continue to impose their own view, and thwart the people's view as expressed at the polls and through Congress.

The solution proposed by the President proceeds on the sound assumption that the difficulty in the last analysis is with the judges and not with the Constitution, is with judges of closed minds not with judges of open minds, and therefore is with aged judges who are more apt than younger judges to have closed minds. It is a fact that, just as age often hardens the arteries, so also does it often harden the mind. There are exceptions to both, naturally, but by and large it is so. Take, for example, the recent minimum wage decision, which at long last overruled the Adkins case. *All* of the justices under 70 were of the opinion that minimum wage legislation was constitutional; but *two-thirds* of the justices over 70 adhered to the view that it was unconstitutional. That, it seems to me, is a good illustration of the general rule. When justices of the Supreme Court were first appointed their average age was 52½. The average of the present justices is 72, the oldest in the whole history of the Court. Men are not the best judges of their own declining powers. So there should be an age limit set for judges and for other public officials holding life terms.

The constitutionality of the President's proposal seems so clear that it is hardly worth mentioning here. Congress in the first instance fixed the size of the Court and since then has changed it six times. Such a change today would not be any less valid than in the past. It would not be establishing a precedent. The precedent is already established. A constitutional amendment fixing an age limit for the justices might well be adopted, but one fixing definitely the size of the Court would be taking away from the Congress a right originally left to it, and which may prove as valuable in maintaining the original balance in the future as it may prove today, when the mere proposal of a change has been productive of results.

Some may say, "But never before did a President change so many justices as to give him control of the Court." President Taft appointed a majority of the Court and a Chief Justice. President Roosevelt has within a few days had his first oppor-

tunity to appoint a Supreme Court justice. When he fills that vacancy, even if he appoints in addition all that the proposed law will permit, he will have appointed only a minority of the Court.

Others may say, "But we can't allow the President to pack the Court." If it is "packing" to ascertain the views of prospective judicial nominees in advance, then the practice has been followed by many Presidents. When Madison had a Supreme Court appointment to make in 1810, Ex-President Jefferson wrote, "The death of Associate Justice Cushing gives an opportunity for at length getting a Republican [He meant of course what we now call 'Democratic'] majority on the Supreme Court bench. Ten years has the anticivism of that body been bidding defiance to the spirit of the whole Nation if they had manifested their will by reforming every other branch of government. I trust the occasion will not be lost. Nothing is more material than to complete the reformation of the Government by this appointment." In the light of this letter, it would seem that the currently much-advertised "Jeffersonian" Democrats are more Jeffersonian than Thomas Jefferson himself.

To turn for a moment to leaders of the other party, we know that Abraham Lincoln, prior to Chase's appointment, inquired as to the latter's "soundness on the general issues of the war." We know also that Theodore Roosevelt wrote the elder Senator Lodge about such matters. On July 10, 1902, he wrote about Judge Holmes as follows: "Now I should like to know that Judge Holmes was in entire sympathy with our views, that is with your views and mine and Judge Gray's, for instance, just as we know that ex-Attorney General Knowlton is, before I would feel justified in appointing him. Judge Gray has been one of the most valuable members of the court. I should hold myself as guilty of an irreparable wrong to the nation if I should put in his place any man who was not absolutely sane and sound on the great national policies for which we stand in public life." And on September 4, 1906, he wrote about Judge Lurton, "Nothing has been so strongly borne in on me concerning lawyers on the bench as that the *nominal* politics of the man has nothing to do with his actions on the bench. His *real* politics are all important." And he went on to discuss Judge Lurton's attitude on various public questions and continued, "On every question that would come before the bench he has so far shown himself to be in much closer touch with the policies in which you and I believe than even White, . . ."

Not only should a President make such investigation, but the Senate, whose duty it is to confirm or reject an appointment, should do so too. My colleague, Senator Borah, expressed this thought very forcefully in the Senate in 1930. He said, ". . . . the Supreme Court of the United States said that our action was null and void. Mr. President, that is what makes this matter so very important. They pass upon what we do. Therefore, it is exceedingly important that we pass upon them before they decide upon all of these matters. I say this in great sincerity. We declare a national policy. They reject it. I feel I am well justified in inquiring of men on their way to the Supreme Bench something of their views on these questions."

The President has acted in accordance with the platform on which he stood in the last campaign. He has not proposed to amend the Constitution. His critics are obviously disappointed that he has not proposed to amend it. Nevertheless they say in effect, "If the Constitution is to be amended, let it be only in the way the Constitution itself provides!" Yet they ignore the fact that it has been amended and re-amended in another way, and that is by justices of the Supreme Court construing it to accord with their own personal, social and economic views.

Look at the last minimum wage case decision! In the forenoon of Monday the 29th of March, 1937, such legislation was, as it had been for 14 years previously, prohibited by the Constitution. In the afternoon of that same day such legislation was permitted by the Constitution. Who amended the Constitution? Was it the President, or the Congress, or the legislatures of 36 states, or 36 state conventions? No! It was simply Mr. Justice Roberts. He changed his mind. "The Constitution is what the judges say it is." The Constitution is what Mr. Justice Roberts says it is. The Constitution is what he says it is *now*. This is not said in disrespect of the learned Justice. It is more important to be right than to be consistent. His courage and open-mindedness command respect. Neither is it said in criticism of majority rule, which would apply equally to an enlarged court. It is said to emphasize the fact that the Federal Constitution is not something fixed and definite, having the precision of a tax statute, or of a zoning ordinance. Although it is a written instrument, it is a living changing thing. That most glorious instrument of government was conceived for no specific time. In its fundamental provisions, it sets forth principles applicable to all times. These principles have to be applied from time to time to make timely their timelessness. Look at the recent decisions on the Wagner Labor Act and on the Social Security legislation: the change of one judge's opinion would have meant vital changes in the relations of capital and labor, and in the welfare of every wage-earner in the country! The contrary view may be summed up in the recent words of Mr. Justice Sutherland who said, "The meaning of the Constitution does not change with the ebb and

flow of economic events." And he said this in giving his opinion that the due process clause in a Federal constitutional amendment applies to a state law establishing a minimum wage.

But it is still insisted by some persons, in spite of these occurrences, and in spite of the score of times the Supreme Court has overruled itself on constitutional questions, that the New Deal objectives should be reached only after a constitutional amendment has been duly proposed and ratified. I cannot agree with this for several reasons.

In the first place, a constitutional amendment is unnecessary. The Constitution is sufficient as it is, if consistently construed in the light of changing conditions. The recent decisions on minimum wage legislation, on the Wagner Labor Act, and on the Social Security laws offer abundant proof that the Constitution unamended is broad enough even for the exacting needs of the present day. The only question is whether future decisions will be based on an equally broad construction of it.

The late James Bradley Thayer in his "Legal Essays" summed this up admirably as follows: "As it (the Constitution) survives fierce controversies from age to age, it is forever silently bearing witness to the wisdom that went into its composition, by showing itself suited to the purposes of a great people under circumstances that no one of its makers could have foreseen. Men have found, as they are finding now, when new and unlooked-for situations have presented themselves, that they were left with liberty to handle them. Of this quality in the Constitution people sometimes foolishly talk as if it meant that the great barriers of this instrument have been set at naught, and may be set at naught, in great exigencies; as if it were always ready to give way under pressure; and as if statesmen were always standing ready to violate it when important enough occasion arose. What generally happens, however, on these occasions, is that the littleness and the looseness of men's interpretation of the Constitution are revealed, and that this great instrument shows itself wiser and more far-looking than men had thought. It is forever dwarfing its commentators, both statesmen and judges, by disclosing its own greatness. In the entire list of the judges of our highest court, past and present, in the business of interpreting the Constitution, few indeed are the men who have not, now and again, signally failed to appreciate the large scope of this great charter of our national life. Petty judicial interpretations have always been, are now, and always will be a very serious danger to the country."

In the second place, the constitutional amendments so far proposed have more obvious shortcomings than the President's proposal, and no amendment proposed has had any general support.

Take first the amendment proposed by my learned colleagues Senators Wheeler and Bone, which proposes to let Congress repass by a two-thirds majority acts invalidated by the Supreme Court. This amendment loses sight of the fact that statutes, unlike eggs, are not wholly good or wholly bad. Take the Railroad Retirement Act. Five justices were of opinion that Congress lacked power to pass pension legislation for interstate railroad employees; all the justices were of opinion that the Act as drawn contained invalid features, the minority believing that the invalid portions were separable. Under the Wheeler-Bone amendment, Congress would, by re-enacting the statute, repass the parts which an unanimous Court believed to be invalid. Moreover, this amendment would not help the States. It would not validate the Vermont act held invalid over strong dissent in *Colgate v. Harvey*. Nor if Mr. Justice Roberts had remained as unyielding in the minimum wage matter as some of his colleagues, would it have assisted the New York statute declared unconstitutional in the Tipaldo case.

Senator Borah's amendment would not in my opinion be any more helpful. This amendment proposes to rewrite the Fourteenth Amendment so that due process henceforward shall have reference only to procedure. The distinguished Senator from Idaho insists that this would leave the States free to experiment with social legislation. So it would, but, since it would abolish the substantive concept of due process of law, it would also open the door to legal confiscations of every kind. So long as the victim received notice and an opportunity to have his objections heard, he could handily be separated from his property, and, it may be, from his life and liberty as well. Moreover, the Borah amendment would not help Federal legislation. The District of Columbia minimum wage law, invalidated in the Adkins case, would have had to wait for a change of heart on the part of the Court, just as in fact it had to wait for fourteen years; the Borah amendment would not have aided it.

Then there is the O'Mahoney amendment, proposed by the able Senator from Wyoming, which would require a 6 to 3 or a 7 to 2 vote to declare a statute unconstitutional. How would this work in case the vote were 5 to 4? Which opinion would be the opinion of the Court, that of the majority or that of the minority? Which opinion could be cited as a precedent, or as an analogy in later cases? The amendment would introduce into our constitutional law the novel, and, I submit, unsound doctrine of minority rule. It might well place some of our most treasured liberties at the mercies of a small minority. Furthermore, as Judge John P. Devaney has pointed out, "Under an amendment requiring a 7 to 2 vote, one member of a minority

of three would often sacrifice his intellectual conviction to his sense of loyalty to the united front of his court and vote with the majority rather than subject the court to the criticism of declaring a law constitutional or unconstitutional by three votes. The logical reform of the amendment would succumb to the sense of loyalty to the majority of the court." This is not fanciful. In Ohio, where such a constitutional provision is in force, this has actually happened. In *Board of Education v. Columbus* 118 Ohio State 295, the opinion referred to an earlier case, *Morton* v. *State* 105 Ohio State 366, where six judges concurred as to the unconstitutionality of a statute and commented: "This was a plain concession on the part of two judges in order to avoid a situation created by the amendment of Section 2 of Article IV."

So it is apparent, even from this brief review, that most of the amendments thus far proposed would be unsatisfactory. I am far from saying that a satisfactory amendment cannot be drawn, but I do insist that if such eminent lawyers as the authors of these proposals, who have devoted much time and thought to the subject, are unable to draft amendments which can survive even a cursory scrutiny, it will be a long, a tedious, and a difficult task to draft an amendment which will prove satisfactory.

In the third place, it is doubtful whether any such amendment would really help. After all, we are confronted with an attitude of mind. The frame of mind that can give the Constitution "a tortured construction" to use Mr. Justice Stone's phrase, is fully capable of giving a tortured construction to any amendment. We do not want an amendment that goes too far in the grant of substantive powers. On the other hand we cannot press for an amendment each time that a specific case arises. In other words what is needed is an amendment which embodies the constitutional philosophy of Mr. Justice Holmes in such a way that it will be proof against the constitutional philosophy of Mr. Justice McReynolds. I will not be dogmatic and say it cannot be done, but I can safely state that I have not seen it done yet.

In the fourth place and finally, any such amendment proposed by Congress is practically sure to fail of ratification for a long time to come. This doubtless is one reason why the amendatory process is so strongly urged upon us by many opponents of the New Deal. It is not a question of popular support. The President carried my own State of Rhode Island last November by about 40,000. Yet the Senate consists of 27 Republicans elected by 51,711 voters and only 15 Democrats elected by 120,319 or over twice as many voters. A similar situation exists in many other states. Any amendment opposed by the minority party probably could not be ratified even if approved by a large majority of the people.

But it is suggested that ratification could be by State conventions instead of by State legislatures; to which I reply that the conventions would have to be called, and their composition determined by these same legislatures opposed to the amendment, so that the outcome would be the same. Some persons suggest that Congress could call the conventions and fix their composition. That has never been done. It would involve the Federal government in a state election in an unprecedented way, and is of doubtful constitutionality.

There is nothing in the President's proposal which lessens the power of the Court to declare a statute unconstitutional. These new judges will be as free as their predecessors in all respects. What is needed and what the proposal provides is not subservient judges, but more open-minded judges. The present court is in large measure, four-ninths to be exact, not open-minded. It is that which has brought on the crisis; it is that which makes some remedy imperative. Despite the encouraging trend of decisions since the President's proposal was first advanced, it is not safe to trust the destiny of 130 million people to a single and unpredictable judicial mind.

Talk of dictatorship seems to me fanciful. But if it is to be feared, from which direction does it threaten? The present danger is not of the Executive encroaching on the Judicial. The danger is of the Judicial encroaching on the Legislative. Was there ever in any democracy a dictatorship comparable with that of Mr. Justice Roberts? As his opinion changes he prohibits or permits the fixing by great sovereign states of a minimum wage for tens of millions of working people. He lays down and later reverses the fundamental law for 130 million Americans. The powers of the Congress and of the President, of the Federal government and of the state governments expand and contract as he speaks from the bench. He is not answerable to anyone. He is not recallable by anyone. The Constitution is what *he* thinks it is. When his mind tends in one direction, railroad retirement, municipal bankruptcy, and minimum wage legislation are unconstitutional; when it tends in the other direction, gold clause, milk control, mortgage moratorium, minimum wage and social security legislation are constitutional. Yet while this is called "Democracy" and "government of the people, by the people, and for the people," the President's mild proposal for reform is branded as "dictatorship" and drives some newspapers and old ladies of both sexes into hysteria. It is true the same situation might arise

(*Continued on page* 475)

WHAT IS THE END OF OUR JOURNEY?

The "Bar Is on the March" but unless Our Destination Is a Place Where the Spirit Can Go and Be at Rest, unless We Carry Our Souls with Us, It Won't Be One Worth Reaching—The Only Things That Men and Women Remember of Marchers Afterward—The American Bar Association Is Worth While Only as It Is a Partner with Those Associations Everywhere Which Forward the Ideals of the Profession—It Carries the Stamp of America and Has Its Virtues and Its Frailties—The Work of the Sections and Committees, and the Significance of Sincere and Inconspicuous Service—America and the Faults of Leadership—A Cult of Truth and Sincerity Suggested*

By Hon. Frederick H. Stinchfield
President of the American Bar Association

MR. MORRIS told me that he would talk on the subject "The Bar on the March." As Chairman of the House of Delegates of the American Bar Association, he is in a position to know the facts. The House is the moving force of the American Bar Association. When it marches, the rest of us will. You have heard what the Chairman believes. I am sure you are able to hear the sound of marching feet and the clank of weapons as the army of lawyers proceeds. But has he told us our exact destination? I am not quite sure about that. He has described the weapons we can use, the armament available. But to what place do we march, and for what purpose? Do our souls and spirits go along, or do we park them somewhere, to be reclaimed when they again interest us and the business in hand is done? Unless this destination is a place where the spirit can go and will be at rest, unless we carry our souls with us, the destination won't be worth reaching. We can as well stay where we are. The place we reach will be no better than the spot we have left. Mr. Morris will be the Frenchman with thirty thousand men, who marched them up the hill and then marched them down again. George Morris is a great general, resourceful, tireless, and ready to take responsibility. He can make us into an army. He can lead us from one place to another place; but what is the victory to be gained?

I make no attempt to describe soul and spirit. I know what they are not. I may not know what they are. I do know they are not selfishness, insincerity, or dishonesty. I know they are the source of real happiness at any place along the road of life; and I am sure they are particularly pleasurable as the journey tends to come to an end and when it shall have ended. I know that in some fashion or other, they endure; and that they are what men and women remember, of marchers, afterwards.

You are courteous. You devote an evening to the American Bar Association. That is considerate and very generous. You have an extraordinary, successful Bar Association of your own. Perhaps there is nothing which our Association can teach you. I shouldn't be surprised. Your officers have always been capable, and your secretary assiduous in your improvement and betterment. But Mr. Morris and I, representing the American Bar Association tonight, are, whatever your state of mind, grateful to you for the recognition you give the Association in which we are interested. Yet the truth is, of course, that we are interested—or perhaps only *ought* to be interested—in the American Bar Association because we are concerned with the welfare of our profession and of society; in fact, only as we are interested in any means by which lawyers may be bettered, can society be helped. The American Bar Association is worth while only as it is a partner with those associations everywhere who forward the ideals of the profession.

It's impossible, I suppose, to think of the American Bar Association as a thing apart from this America in which we live. It isn't apart. Undoubtedly it carries the stamp of America. I wish it could be the opposite, that America could bear the stamp of lawyers, and that that stamp should spell dependability, sincerity, unselfishness, and patriotic devotion to country. We are perhaps strong enough, if we care sufficiently, to make that wish a fact. But we must labor at it always; and we must forever be careful that, being in a minority as we are, we do not yield to the force of the majority and ourselves carry the stamp of the majority. When we think of the American Bar

*Address delivered at the banquet of the Illinois Bar Association on "American Bar Association Night," May 20.

Association and its work, we must always remember, if we are realistic in thinking of its faults or its virtues, that it is a part of America, it can take credit for having the virtues of America, but it must be charged also with having its frailties. Would that it were possible to eliminate the frailties, and that lawyers should be the reflection of only the strength of America.

There can be little question but that America is the greatest of the earth; that here dwell the best chances for liberty and for mental, spiritual and physical comforts; that we are not yet overwhelmed by numbers, poverty, nor poor in resources. It may be that strangers, coming for the first time to see us, might not believe us to be that country of the world with a superior chance for happiness. If the stranger, reaching our shores, were to read over and over again that a large part of us is ill housed, ill fed, and ill clothed, and that the sole desire of those with property is to get more and to deprive the poor of what they have, he might question our standing amongst the countries of the world. Yet he would be wrong; for all the world would come to our shores, would their country and our country permit. No one can doubt our reputation amongst the downtrodden of the earth. Perhaps it is well to remember that. In remembering it, however, we might think of the sources from which that result springs. We should then recall that nature has given us unparalleled resources; that our wealth has come, in the first instance, from what was here when our forefathers came. We would recall, of course, and be pleased with it, that we have been an energetic, mentally alert people, ready to work to whatever extent success required. We should bear in mind that we have more physical comforts than any other part of the world, unfamiliar with us, can imagine. We should remember that any man or woman may go from the lowest to the highest place in life by his own efforts alone; that no class feeling has prevented that advance. But when one has thought of all these things, he then remembers an old French saying, that every man has the faults of the temperaments which make possible his virtues. We should then realize that energy and alertness of mind, willingness and determination to work and to succeed, carry with them the seeds of corruption. It is very easy for energy to become unscrupulous, for mental alertness to become shrewdness, and for willingness to work to become slavery to work. We were told, in Washington, early this month, by the Chief Justice of the United States, that no monuments are raised to mere shrewdness. I hope so; but I'm not always sure. We give, sometimes, worshipful recognition, in life, to mere shrewdness. You would remember that our unparalleled resources and personal liberties make it possible for men to acquire so much wealth as to be destructive of that spirit of moderation of feeling and of heart which made an early Greek civilization perhaps the greatest the world has ever known. Thinking of all these things, we would then understand why it may be suggested that on any march America or its lawyers undertake there should be emphasis upon the soul and spirit marching with the bodies. It is so easy to neglect or forget the spirit; and in it lie all the things worth while.

Let us think of this work which the sections, the committees, and the officers of the American Bar Association do. Why is it done? Is it primarily for the welfare of somebody else, for the advancement of learning, for the happiness of society, for assisting the poor and afflicted? If it is, our souls go along with us on the march. But if, primarily, we are working in order that our reputations may be enhanced, that we may gain the outward signs of honor from our fellow men, and if all that is the main consideration, then we are merely on the march but without a destination. Our extraordinary means of publicity in America are, I am sure, the wonder of the world. Very little misses the means of publicity. Only a few things can be done with which a curious world is concerned which that world will not be told. That is an advantage, a blessing. It is well for us to know what is happening to the rest of us. The knowledge makes for wisdom. But that very publicity has a reaction upon him who receives it. The publicity becomes an end in itself. Therein lies the danger. The joy of recognition becomes the desire of him who works. When that happens, the soul and the spirit of the good deed are gone. The work is then for a selfish end, to satisfy a lower part of the man. The devotion to others, the wish to help others, has disappeared. The desirable end has been lost sight of; the dross remains. Amongst our officers and committee workers there are too few of the most successful of the country. Why? You will find those who have been more than commonly successful, giving their time to the work of Bar Associations and to the professions; but, to a great degree, too few. Please tell me why. Every lawyer must know that his best chance of helping society and of aiding the world is by means of the Bar Associations of his city, his state, and his nation. Why should not the ablest of the lawyers in every community occupy humble positions upon committees, seeking, perhaps even refusing, advancement on the committee or advancement in the Association? Why should the primary object so often be, amongst those who work in the Associations, the attainment of the uppermost rung of the ladder?

There is something there to be thought about, something perhaps to be cured. You recall that John Quincy Adams finished his term as President of the United States in 1829. From 1830 to 1848, when he died, he was a Congressman. When he

was about to seek the votes of the electors for that position, a friend suggested that to become a Congressman degraded the presidency which he had occupied. His reply was, "No person could be degraded by serving the people as a representative in Congress or even as a selectman of his town." Nearly a hundred years have passed. There are those who say that the most valuable work of John Quincy Adams was done while he was Congressman. It is the spirit which was in him, of which I speak. He had achieved the highest honor our country could offer him; yet since there was a lower place where he could be of service to his people, he accepted it and worked with utter devotion. We know Lawrence of Arabia. Perhaps his works saved the world. Offered the marks of the highest honors of his country, they were all refused. He served under a name other than his own. His labors done, he disappeared from contact with the mighty. He later enlisted as a private in the air corps—under a still different name. In that service he died, in time of peace, in the most common of ways. But what he did, what he wrote, will better the hearts of the world for generations to come. Perhaps he couldn't have written as he did had he remained in the vortex of world activities. But it amazed us all that he worked only for the good of the world and of his soul, without hope of or willingness to accept reward. That all of us were amazed at such sacrifice, is something for us to remember when we think of whether we ourselves are of worth. The ideals of those two men I recommend to myself and to all the lawyers of the American Bar Association. When we shall have enlisted in the work of the Association the ablest men of our country, and they are willing to serve in the humblest capacities, there will be no question as to the place we shall have reached on this march.

I wouldn't be too harsh. I wish merely to be realistic—to be accurate. The American Bar Association has done one job this year in which were all its soul and spirit. I don't need to tell you much about it. That work concerns the Supreme Court of the United States. Throughout the world we have seen autocracy seizing all powers. We have seen bureaucracy, with all its littleness, running rampant. Waste has been everywhere. We have seen individual and state liberties disappearing. We have noted politicians increasing, taxes becoming destructive. But an attempt was made to seize what has been the main source and protection of our liberties, the Supreme Court. In trying to prevent its loss, we have regained ourselves, a little. For with over 80 per cent of the Bar, business, position, property, politics, reputation have meant nothing beside the determination to save that protector of our individual liberties. In that work we have put not only our energy and our devotion, but our ideals and everything that we have left of our souls and our spirits. We may be successful in retaining for ourselves that bulwark of liberty. If so, it will be because we have used something more than our native and experienced energy, power to work, and the property we have. We shall have spent in that task our spirits; and in spending that spirit we shall find it has increased in us a hundred-fold.

Of late I have wondered about the source of America's ills. We know they are less than the ills of the rest of the world; but they are still too great. I have wondered why the promises of new men are so eagerly grasped, why it makes so little difference that a promise is not kept if another good promise is but made. It's an evidence of hopelessness in our people, a sign that we are grasping at straws. I have been wondering whether we who have lost the influence we once had aren't paying back a debt which we incurred. Have we, in days past, not made promises which we knew could not be kept; did we not make them because we believed those who listened to us enjoyed hearing the promises? In business, in politics, in the church, in all things in life, have we not attempted to satisfy the desire to please those who listened to us; and over 150 years have the listeners not learned that what businessmen said about business, lawyers said of the law, and preachers said of religion were not true? Is it not for that reason that the leadership of those who once headed our armies has been discarded, and the leadership of others accepted? Of course, I fear that the pattern of the new leaders will be no different from that of the old leaders, because I fear that those leaders too will bear the stamp of America; that their promises will be found false. How long promises to pay may be neglected before utter bankruptcy of the spirit and even of the body occurs, I do not know. But I am certain that bankruptcy will come, and with it the destruction of all the blessings we have. Could we not form a cult amongst the leaders, of saying only the things which one believes, giving only the reasons for action in which one has faith, and discarding all expression of sentiments meant merely to be pleasing to those who listen? Wouldn't, in a considerable length of time, the results be better? Is it not possible that lawyers could take the leadership in some such ideal, in some such determination? It will take strong men to carry out the ideal, for in doing these things men will often be unpopular, although in the end they may be honored. Can we not determine to do any and all that we do, not with a desire for mere pleasant recognition and for public honor, or even to persuade, but in order that people may be told the truth in the hope that the truth will make them free?

To apply what we are talking about, directly, perhaps there will sometime be a president of

the American Bar Association willing to accept no invitation to speak, who will refuse the very great courtesies and honors which you throughout the country are so ready to do the man who temporarily occupies that position. He may insist upon doing nothing but the work of the Bar Association. There may come a time when the ablest of our men will accept positions on committees over and over again, and refuse chairmanships or advancements to official position. There may come a time when presidents will refuse the publicity which is so generously offered, and when chairmen of committees will think not at all of what lawyers or laymen think of the work they have done except in so far as it is of value to the world. We may sometime have presidents and chairmen of committees and of sections who will be like secretaries or treasurers or executive secretaries of Bar Associations—those men and women who do so much of the work, make possible the success of Associations, and whose names so few people know. When that time shall come, one can but merely ask. He can't prophesy. Will we not have an American Bar Association on the march, with a destination known, that destination known to be one where sincerity, humility, and honesty of purpose are to be found, and no other reward desired?

Value of Membership in Insurance Law Section

BY CHARLES W. MORRIS
Member of Louisville Bar

SINCE the organization of the Insurance Section, the general membership of the American Bar Association has labored under a misconception regarding its value to the average lawyer. The prevalent impression, that Section membership is advantageous only to insurance specialists, is strengthened by the eminence, as insurance lawyers, of Section officers and executives, and by the apparently technical and restricted nature of advertised papers and discussions.

Actually, membership in the Insurance Section is more beneficial to the general practitioner than to the so-called "insurance lawyer."

Throughout this country, especially in the larger communities, there are legal firms who have come to be known as "insurance lawyers." Their names are listed in numerous directories; they employ staffs of trained investigators; their libraries are stocked with textbooks and encyclopedias devoted to the law of insurance. As time goes on—and these attorneys become more and more proficient and better established in their specialty—they acquire more insurance companies as clients and, ultimately, in many cases, find their general practice drifting to other offices. The process represents a circle, though not necessarily a vicious one. The increase of insurance practice results in a falling off of general business; the decrease in general practice spurs the attorney to concentrate more energetically on his insurance work.

As a perfectly natural consequence, the insurance lawyer has less occasion to explore the wide avenues of legal research in general, and—by the same token—it is necessary for him to familiarize himself with the latest decisions, the newest theories, and the constantly changing scene in his own field. Thus, the papers, articles and discussions sponsored by the Insurance Section are usually "old stuff" to him. They tend to titillate rather than educate him. In many instances they serve merely to reintroduce him to old acquaintances.

On the other hand, the man whose insurance work is only incidental lacks both the time and the facilities for acquiring a thorough familiarity with the various branches of insurance law. Each occasional insurance problem requires the conscientious attorney to make an extensive exploration into the maze of text and case books, often necessitating visits to law libraries and the offices of other lawyers. Suppose such a lawyer is confronted with a question involving the presumption against suicide, as related to a health and accident insurance problem. There are, literally, thousands of cases on this subject. A thorough independent investigation would require hours and days. Yet, if the attorney in question happened to be a member of the Insurance Section, he could find, by turning to the published proceedings of the 1936 convention, an exhaustive discussion of this subject ("The presumption against Suicide, etc." By Alva M. Lumpkin of South Carolina. p. 117) which, if it did nothing else, would *start* him on the right track.

Moreover, it must be remembered that elements of insurance law are not restricted to cases where one represents or sues some insurance company. There is scarcely a branch of the law which cannot involve, indirectly, the question of insurance. Leases, deeds, contracts of employment, agreements between architects and general contractors, probate matters, will contests—all of these, and a veritable legion of other topics are potential breeders of insurance problems. Thus, the executor of an estate may present to an attorney the somewhat esoteric question of the right of a life insurance company to make a difference in the amount of dividends paid upon policies with and without disability benefits. One would scarcely know where to begin the study of this problem. But members of the Insurance Section might find a comprehensive review of the entire subject (Discussion by William Marshall Bullitt, of Louisville, Kentucky, p. 101) in the published reports, mentioned above. $2.00 a year is a small price indeed for such assistance.

Finally, to the lawyer in the smaller towns (where there are no firms specializing in insurance) membership in the Insurance Section offers an ethical opportunity for the acquisition of new and valuable business. For, if an insurance company or a metropolitan law firm should require the services of a legal representative in a small community, what could be more natural than a reference to the local attorney who has attended sessions of the Section and has manifested his interest in insurance law by his enrollment as a member?

The foregoing should not, of course, be construed as suggesting that any insurance specialist can afford to remain a non-member of the Section. "A man is known by the company he keeps" and a glance at the roster of Section membership discloses an imposing array of insurance counsel. With certain lamentable and inexplicable exceptions, that list contains the names of the recognized leaders in this branch of the law; and in making contacts in other cities, the writer frequently consults the roster of Section members, feeling that, of *all* law lists, this list cannot possibly be objectionable.

AMERICAN LAW INSTITUTE HOLDS FIFTEENTH ANNUAL MEETING

Large Attendance and Freshness of Enthusiasm for the Work in Hand Mark Sessions—Restatements in the Fields of Torts, Property and Security Considered and Approved at Meeting—Third Volume of Restatement of Torts Adopted for Official Publication to Accompany the Two Volumes Already Published—Vigorous Discussion of Proposed Airflight Act—Model Property Act Presented—Report of Director William Draper Lewis Gives Summary of Work of Institute to Date and Tells of Further Projected Activities—Adviser on Public Relations, Herbert F. Goodrich, Reports Growing Acceptance of Restatements and Progress in Annotation Work in Various States—President Roosevelt Sends Letter Extending Best Wishes for Continued Success in Work—Chief Justice Hughes Delivers His Annual Message to the Institute—Annual Dinner Has Unusual Feature

By Charles Berry Howland
Member of the Philadelphia Bar

THE fifteenth annual meeting of the American Law Institute brought more than 700 of the leading judges, lawyers and law teachers of the States to Washington on their pilgrimage in the cause of the Restatement. As usual, the sessions were held at the Mayflower Hotel, and as usual they were marked by spirited debate in the consideration of drafts presented by the several Reporters and the Council.

Chief Justice Charles Evans Hughes delivered his annual message to the Institute to open the sessions. More than 1,000 persons were gathered in the ballroom of the Mayflower Hotel when he was introduced by President George Wharton Pepper. He paid warm tribute to the leadership and vision of Elihu Root to whom the Institute so largely owed its establishment and whose death occurred during the past year. In accordance with his custom of previous years, Chief Justice Hughes then referred to the work of the Supreme Court and reported that he was happy to say that it was "fully up with its work," and that during the week of May 3, 1937 cases had been argued which were filed as late as April 20. He discussed the work of the Court and concluded with a ringing expression of his opinion that the success of democratic institutions lies in the success of the processes of reason as opposed to the tyranny of force and that between these two, society must choose.

The reports of the Director, William Draper Lewis, and of the Adviser on Professional Relations, Herbert F. Goodrich, were then presented. Dealing with the Institute's work accomplished to date, with the work now in process and in immediate contemplation, and with the progress of local annotations of the Restatement by bar association committees and law schools in the various states, extensive quotations from these reports are to be found hereafter in this article.

Of striking significance, however, were the statistics in Dean Goodrich's report concerning the ever increasing judicial use of the Restatement. How widely it is being used as authority in trial courts cannot of course be exactly determined. But as to appellate courts, as shown by the tabulation of the Frank Shepard Company, up to April 28, 1937, there were 459 citations by the Federal Courts, and 3,023 by the State Courts, making a total of 3,482 court citations. Law Review citations numbered 6,956. The total is 10,438.

Restatements in three different fields, Torts, Property and Security, composed of five drafts, were considered and adopted by the members of the Institute at this annual meeting, and in addition, drafts of two model statutes were presented, namely an Airflight Act and a Property Act. The third volume of the Restatement of Torts was adopted for official publication, to accompany the two previously published and to bring the total number of completed volumes of the Restatement to thirteen.

Immense popular interest was aroused by the Airflight Act. This is a proposed Uniform Law of Airflight. It has been drafted by William A. Schnader, formerly Attorney General of Pennsylvania, who acted as the Institute's Reporter in preparing the Act. Mr. Schnader is also chairman of the Committee on Aeronautical Code of the National Conference of Commissioners on Uniform State Laws and likewise chairman of the Committee on Aeronautical Law of the American Bar Association. The Airflight Act was prepared with

the joint advice and cooperation of the American Bar Association and the National Conference of Commissioners on Uniform State Laws. The Act is divided into three subjects: (1) Uniform Aviation Liability Act; (2) Uniform Law of Airflight; and (3) Uniform Air Jurisdiction Act. The first is the most important, making specific provisions as to amounts and limits of liability. It provides that an owner of aircraft shall be liable, *regardless* of negligence, for injuries to individuals or property on the land, when caused by ascent or descent or other movement of an aircraft, or by the falling of an object therefrom. Recovery for personal injury or death would be permitted to the extent of actual damage but not to exceed $10,000 to any one individual. A schedule of limitation of financial liability to any number of individuals in any one accident is set up, maximum amounts being based upon the varying horsepower of the aircraft. The Act also provides that the owner of aircraft shall be liable, regardless of negligence, for injuries to paying passengers, in accordance with a schedule of amounts set forth. In the case of injuries to guests, liability shall be determined on the same basis as that presently applying to guests riding in automobiles. Of course, a plaintiff may waive the benefits provided for in the Act and sue to recover larger amounts, provided he affirmatively proves negligence. No one shall be permitted to operate aircraft unless he assumes the liabilities imposed by this Act. And of striking importance is the provision which makes insurance compulsory.

The discussion evoked by the Airflight Act was vigorous, representatives of various aviation interests having been invited to be present. It was pointed out that in dealing with the provisions as to liability limits and insurance requirements, the Reporter and his Advisers had obtained data from companies now engaged in writing aviation insurance. Particular popular pertinence was given to the Airflight Act by reason of the fact that it came before the Institute for discussion the day following the crash of the German Aircraft, the Hindenburg.

There was ample evidence manifested by the very large attendance at the Annual Meeting that the devotion of the members to the Institute's work remains undiminished. The freshness of their enthusiasm is attested by the fact that busy judges and practitioners, representing nearly every state in the Union gave a week, and sometimes more, of their time in the furtherance of the task of Restatement.

In opening the sessions of the Institute, the President, George Wharton Pepper, informed his listeners that he was about to make the most popular presidential address in the Institute's history. And he said that he had assured himself that such would be the case by omitting it entirely. Thereupon he introduced the Chief Justice of the United States.

Chief Justice Hughes Pays a Tribute to Elihu Root—The Supreme Court's Work—Measures for Improving Procedure—"The Success of Democratic Institutions"

FOR the eighth time it is my privilege to greet you at this annual rendezvous of the members of the Bar and Bench. Last year we paid our tribute to George Wickersham, whose outstanding service as the President of the American Law Institute was the crown of his professional career. Today, we recall the leadership of Elihu Root, to whose vision, creative force and directing skill, we largely owe the establishment of this great enterprise of restating the law and removing in a substantial degree the uncertainty and complexity which vex its administration.

Elihu Root will be remembered as one of America's most eminent statesmen. His service as Secretary of War and Secretary of State will always be conspicuous in an imperishable record. But he was preëminently a great lawyer and his distinctive public service was made possible because he was a great lawyer. He was great not only because he had a rarely acute mind and had mastered the technique of his profession, but because he was wise. He brought wisdom not only to the service of his clients but to the carrying out of the highest conception of public duty in relation to the opportunities of the Bar in improving the administration of justice. His intellectuality was so marked that only those who knew him well fully appreciated his passionate zeal for betterment. When I was charged with responsibilities in the government of the State of New York he warmed my heart and gave me fresh courage by his effective support in time of need. He constantly sought to improve the institutions of justice, local, national and international. How many important endeavors had the impetus of his proposals and his guiding hand in carrying them out! He led in the constitutional conventions in New York of 1894 and 1915. He promoted the organization of the Conference of Bar Association Delegates, which was the nucleus of a coordinated Bar of the United States. His sagacity pointed the

way to the solution of the difficulties which beset the organization of the Permanent Court of International Justice. No idle fancies dominated his thought or made his efforts vain. Whenever he appeared there were vision, practicable proposals and skillful execution. When the American Law Institute was organized, he clarified the need, he showed the necessary method, he procured the financial aid which made the enterprise possible. He had no illusion as to the difficulties. In his initial address he said: "Perhaps we can help." The "making of a permanent organization to accomplish the restatement of the law, with the earnest and real interest in the subject on the part of real men, will help; and as time goes on the organization which you have made may accomplish such relations with other organizations and such additional duties, and avail itself of such opportunities, as to aid all along the line in the reform of law and the reform of procedure." A prophecy, which I hope will be fulfilled as you approach the completion of your first great task. And he added: "We may not succeed; but we can try. Here is one thing we can try. It is something the need of which is universally recognized. It is something the responsibility for which rests especially upon us. It points the pathway where we will be acknowledged the natural leaders of the democracy in its struggles towards better life, towards permanency of institutions."

Elihu Root's method was thus to marshal the forces of intelligence in order to meet a specific need in a sensible fashion. And through the use of this method, he had faith—an abiding faith—that the competency of mankind to govern itself through democratic institutions could be vindicated. Your notable achievements have been due to that method and have been inspired by that faith—a laborious method indeed, but what labor is too great if it may serve to buttress in any degree the institutions of an ordered liberty? We erect no monuments to mere shrewdness. We honor Elihu Root for his specific services to the community, but not less, rather chiefly, because his intellectual power and practical judgment, matched by zeal for the public good, dignified the processes of reason by which alone the ends of our social organization may be attained.

It has been my custom on these occasions to refer briefly to the work of the Supreme Court. For several years I have been able to report at these meetings that the Court is fully up with its work. I am happy to say that this is true of the current term. We are concluding the hearing of arguments, and once more we have heard all the cases that are ready to be heard. This week cases have been argued which were filed as late as April 20th. There are no inordinate or unjustified delays in the Supreme Court.

The figures for the current term do not vary greatly from those of the terms of recent years and I shall not trouble you with many of them. The total number of cases on our dockets for the current term is somewhat less than the number for last term. As of May 1st, there were 946 cases on our appellate docket this term as against 986 last term, or 40 less. This term there have been argued and submitted on the merits 182 cases, including as one case those argued and submitted in a single group, or 218 cases in individual numbers. This number embraces cases on appeal and cases in which certiorari had been granted. Last term there were argued and submitted 169 cases, or 214 in individual numbers.

We have thus far during the current term granted 123 petitions for certiorari and denied 583. The number granted is close to the usual percentage of petitions which have been found entitled to a grant under our rules. These rules, as I said in my talk to you three years ago, are designed to carry out the intent of the Jurisdictional Act of 1925 in insuring the hearing of cases that are important in the interest of the law. That is, where review by the court of last resort is needed to secure harmony of decision in the lower courts of appeal and the appropriate settlement of questions of general importance so that the system of federal justice may be appropriately administered. As I have frequently stated, we are liberal in the application of our rules and certiorari is always granted if four Justices think it should be, and, not infrequently, when three, or even two Justices strongly urge the grant.

It may also be noted that of the petitions for certiorari which have been acted upon thus far during the current term, 233 were distributed to the Justices during the last summer and were examined by the Justices in the recess so that action could be taken, and it was taken, as soon as the Court convened in October. In addition, there were distributed to us during the summer recess 33 jurisdictional statements and 22 miscellaneous motions, making a total of 288 applications which we considered in the summer recess and were ready to act upon when we met in conference at the beginning of our term.

Of course, the final figures for the Term, including the total number of cases that will be disposed of on hearing or otherwise, can only be determined at its close, but what I have said is sufficient, I think, to give you a fair idea of the state of our work.

An interesting feature of the administration of justice in the federal courts is the large percentage of cases in which the Government is directly inter-

ested. Last fall the Attorney General reported to the Conference of Senior Circuit Judges that of 45,175 civil cases (exclusive of bankruptcy cases) which were pending as of June 30, 1936, in the federal courts, 13,715 were "United States civil cases". In June, 1935, the corresponding number of civil cases was 47,332, of which the United States cases were 15,265. In the Supreme Court the Government cases are apparently a larger percentage of the whole. The figures given in the last annual report of the Solicitor General indicate, on the average, that approximately 40 per cent of the cases before the Supreme Court are Government cases.

Since the establishment of the Circuit Courts of Appeals in 1891 there have been four outstanding measures for improving the procedure in the federal courts. One was the new Equity Rules, promulgated by the Supreme Court in 1912, to simplify equity pleading and practice. A second measure was the Jurisdictional Act of 1925, to which I have referred, relating to the jurisdiction of the Supreme Court. That accomplished two results of the greatest importance. One, by enlarging the classes of cases in which jurisdiction should be entertained only upon the grant of certiorari, made it possible for the Supreme Court to devote itself to those cases which demand consideration because of the public importance of the questions involved. Without such a limitation, no court of last resort could possibly perform its essential function in this great country with its vast amount of litigation affecting merely private interests. This limitation upon jurisdiction has worked well and the rules of the Supreme Court, and their administration, have been directed to the carrying out of the intent of the statute and have given to the limitation its just effect. The other result has been that, through the operation of this jurisdictional statute, the Supreme Court has been able to act as a unit in dealing with all the cases before it. In this unique court of last resort, with its special function, that sort of action is believed to be highly desirable. It has the sanction of long usage. Every member of the Court feels his personal responsibility and meets it in each case, save in the rare instances where a particular Justice may be disqualified. Even if a Justice is unavoidably absent so that he has not heard oral argument, he still has the opportunity to study the briefs and may take part in the conference. In this way, continuity of consideration and concentration of responsibility are maintained. It should be remembered that, as a necessary consequence of the principles of selection under the Jurisdictional Act, the cases we hear are important cases. There are of course degrees of importance but the cases come to us because of their important character. The attention of the general public is naturally engrossed in decisions of great constitutional questions. There are those who think that particular cases are especially important because they relate to subjects in which they happen to be especially interested. Many, even lawyers, are too nearsighted to observe the important implications in many decisions which attract no general attention. The members of the Court are always alive to these implications and watch each case with a critical eye. Cases which the ordinary observer might consider to be relatively unimportant may become important precedents and they require thorough study and discussion. The moulding of the law is a continuous process demanding constant and exceptional vigilance in a court which speaks the last word in harmonizing conflicts and establishing the final interpretation of the public law. The Justices work under the influence of this demand and they are keenly conscious of the advantage which has been found to inhere in their historic method.

The third notable advance in federal procedure was made in the promulgation by the Supreme Court, under authority of the Congress, of the Criminal Appeals Rules in 1934. By these Rules it was sought to simplify appellate practice and to put an end to inordinate delays in the disposition of appeals from the District Courts in criminal cases. These rules are few and simple and it is believed that they will expedite appeals without sacrificing any just interest.

The fourth measure for procedural improvement was the recent enactment by the Congress of the statute giving the Supreme Court authority to formulate Rules of Civil Procedure for the District Courts of the United States and the Courts of the District of Columbia. The Court decided to undertake the preparation of a unified system of general rules for cases in equity and actions at law so as to secure one form of civil action and procedure for both classes of cases while maintaining inviolate the right of trial by jury in accordance with the Seventh Amendment of the Constitution of the United States and without altering substantive rights. To give the necessary assistance in this undertaking the Court appointed an Advisory Committee consisting of members of the Bar and professors of law. This committee, composed of eminent experts who have had the advantage of wide experience and have made a special study of procedural questions, has prosecuted its difficult task with unremitting industry. No words of mine can pay adequate tribute to the zeal, assiduity and intelligence with which the members of the committee have labored. A year ago the committee submitted to the Court, and with its approval distributed for the criticism of judges and lawyers, a preliminary draft of the proposed rules. This draft had the careful consideration of judges and of committees of lawyers in their respective circuits, with the result that

the Advisory Committee received many important suggestions. The proposed rules were debated in several local conferences. The committee has been sedulous in considering all these criticisms and suggestions and has now completed a final draft which will shortly be submitted to the Court and will be available for examination by judges and lawyers. I trust that this final draft will receive careful consideration during the coming months so that before the Court meets in the fall the committee may have any further advice that judges and lawyers may care to give. Thus another great work which has called for the expert ability and a wide cooperation of the Bar and Bench is approaching completion. I take this opportunity to express the grateful appreciation of the members of the Court of the earnest work of those who have been devoting their time to this endeavor to provide an improved system of procedure for the federal courts.

All these efforts are to make clear the paths of justice. The success of democratic institutions lies in the success of the processes of reason as opposed to the tyranny of force. Between these society must choose. If society chooses the processes of reason, it must maintain the institutions which embody those processes. Institutions for the exercise of the law-making power and for the execution of laws must have their fitting complement in institutions for the interpretation and application of laws, for the safeguarding of individual rights, through a competent and independent judiciary. The firm and true administration of justice is thus the primary concern of civilized society. That administration must find its ultimate assurance, not in statutes or forms, but in the sentiment of a free people,—themselves tolerant and reasonable and keenly alive to the necessity of maintaining the instrumentalities for the impartial determination of controversies. In the spirit and method of your cooperation you have shown how that end may be achieved.

WELCOME FROM PRESIDENT ROOSEVELT

Director Lewis then read the following letter of welcome from President Roosevelt:

THE WHITE HOUSE

Washington.

"Dear Mr. Lewis:

"I am happy to greet you, members of the bench, the bar, and the law school faculties, who have assembled for the fifteenth annual meeting of the American Law Institute.

"I have followed with interest your accomplishments during recent years in the restatement of the law and your proposals for improvement in the administration of criminal justice.

"Today our stewardship as lawyers is being questioned. The laymen of America are not, perhaps, quite so disposed to make a complete delegation of law matters to law men. At least, the layman asserts his right to evaluate us. Law scholars, law practitioners, law makers, law administrators, and law interpreters, have the stage today. But more significant, they must play their roles before an intense and sometimes critical audience. But this is well. The virtue of the common law was its adaptability to growth and improvement. In generations present and future the lawyer likewise will be measured by the same test.

"It is encouraging today that so many outstanding leaders of the profession assemble to give service in the important and worthwhile task to which the American Law Institute is dedicated. I extend again my warm and cordial greetings to your membership and my best wishes for continued success in your work.

"Very sincerely yours,

FRANKLIN D. ROOSEVELT."

Mr. William Draper Lewis,
Director, The American Law Institute.

The Director then presented his annual report. Before proceeding to it he paid further tribute to Elihu Root, saying: "More than to any other man, this Institute owes to him its existence and its ability to carry on its work on the Restatement of the Law. The story of the establishment of the Institute is a recital of what he did." The Director then traced the history of the formation of the Institute and told of how Elihu Root's guiding hand and personal force compelled the successful carrying out of each important step.

We quote extensively from Director Lewis' report, which furnishes the clearest and most complete analysis of the work which the Institute has completed and upon which it is now engaged and has in future contemplation.

NEW SERVICE TO MEMBERS

AS part of its program for increased service the American Bar Association has made arrangements to furnish to its members copies of Opinions of the Supreme Court, at a cost of $1.00 for each opinion. Copies of opinions will be sent by air mail within twenty-four hours after the opinion is handed down, which means that they should be received anywhere in the United States on the second day. Requests for opinions may be made prior to the time the decision is announced. All requests should be addressed to the American Bar Association, 1152 National Press Building, Washington, D. C., and should be accompanied by a check payable to the order of the Association for $1.00 for each opinion requested. If it is desired that the opinion be sent special delivery, 10c should be added to the remittance.

Director Lewis' Report—The Proposed Final Draft of Torts—Work on Property—Restatement of Security—Work on Statutes—Future Work on the Restatement, Etc.

DIRECTOR LEWIS' report opened with a statement that the first two volumes of the Restatement of the Law of Property had been published last fall, in accordance with the order of the Institute last May. However, publication of the Restatement of Restitution and Unjust Enrichment, which was ordered published at the same meeting, had been postponed on the advice of the American Law Institute Publishers, the organization which prints and distributes the Restatements. The delay had had at least one important advantage: it had enabled them to shorten the title. Last February, at the request of Mr. Seavy, the Reporter, the majority of the Advisers and the Director, the Council favored the short title, "Restitution," with the understanding that the volume should carry a subtitle—the familiar words "Quasi Contracts and Constructive Trusts."

TORTS—PROPOSED FINAL DRAFT—ARRANGEMENT OF WORK

The report then called attention to the proposed final draft of Torts, presented for consideration to the meeting, and covering the divisions of the subject to be included in the Restatement of Torts, Volume 3. To complete the subject would require, the Director thought, one more volume—he did not anticipate that two would be necessary. The proposed final draft of the last division of the subject should be submitted to the Council in February, 1939, and to accomplish this the remaining work had been divided among four groups. Group 1, with Francis H. Bohlen as Reporter, will work on "Damages." Group 2, Everett Fraser, Reporter, will prepare the text on "Natural" Rights in Land, (a) Lateral Support (already covered in the tentative draft), (b) Waters (partly covered in tentative draft), (c) Nuisance (with Mr. Bohlen as Special Reporter for this subdivision). Group 3 will work on Interference in Contractual and Business Relations, with Mr. Bohlen acting as Special Reporter for (a) Contractual, and Mr. Harry Shulman as Special Reporter for (b) Unfair Trade Competition and Related Matters, and (c) Labor Disputes. Group 4, with Edgar N. Durfee as Reporter, has been assigned the work on Equitable Remedies. It is proposed that tentative drafts of all or a part of these divisions will be before the Institute for consideration next year. The report continues:

ORGANIZATION OF THE WORK ON PROPERTY

"Property, like Torts, covers a wide field of the law the divisions of which sometimes not only lend themselves to, but also necessitate, treatment by groups with a somewhat different personnel. The present work on the Restatement of Property is divided into three groups under the general reportership of Richard R. Powell. The first group, for which Mr. Powell is Special Reporter, is working on Future Estates. For some time this group will be engaged, as during the past year, on the Construction of Creating Conveyances. The second group, for which Mr. W. Barton Leach is Special Reporter, will complete before your next annual meeting its work on Powers. The third group, for which Oliver S. Rundell is Special Reporter, is now working and will continue to work on the division relating to Easements and Profits. Each of these three groups has, as you know, prepared for your consideration at this meeting, as directed by the Council, a tentative draft of a portion of the division committed to its charge."

RESTATEMENT OF SECURITY

Under this head the report told of placing before the Carnegie Corporation, in accordance with the direction of the Institute's Executive Committee, a proposal for the expenditure of the $100,000 already set aside by the Corporation for the Institute's use when a satisfactory plan for its expenditure was submitted. The plan proposed the expenditure of $75,000 on the Restatement of Security and of $25,000 "in part on incidental work in this country in connection with the translation by foreign scholars of the Restatement into foreign languages." However, President Keppel of the Carnegie Corporation, while appreciating the interest which foreign scholars are taking in the Restatement, pointed out that the charter of the Corporation did not authorize appropriations for the latter part of the program. The proposed work on Security met his approval and he informed the Director that the Institute could safely begin work on this subject.

The plan had been carried out, and the Executive Committee had engaged Mr. John Hanna, Professor of Law at Columbia University, to prepare a preliminary draft of the first section of the Restatement of Security and such other matters as

should be discussed at a first conference on the subject. Mr. Hanna began work on July 1st and prepared a draft for submission to a conference which was held in September. He was later formally appointed Reporter for the subject, and, with the assistance of his Advisers, placed a draft of the first part of the division Pledges before the Council last February. That draft was before the meeting. The report continues:

FUTURE WORK ON THE RESTATEMENT

"I said in my report a year ago that 'the next three or four years should witness the publication of the rest of Torts and additional major parts of the law of Property.' I have no reason to modify this statement. Apart from these subjects and the subjects already completed, Contracts, Conflict of Laws, Agency, Trusts and Restitution, there are other important subjects ripe for Restatement. On one of these 'Security,' work has already begun. Before beginning work on other new subjects it will be necessary to secure additional financial assistance.

"For the last two years the Council and its Executive Committee have given considerable consideration to some of the more important subjects of the law not yet undertaken for restatement. Among these subjects are the law of Associations, Equity Jurisdiction, Persons, Sales, Evidence, Judgments, Taxation and Admiralty. We have, as you know, already done some work on the law of Associations, the work being confined to corporations for profit. We have also done some work on Sales of Land. At the present time work on neither of these subjects is going forward. If work on Equity Jurisdiction is undertaken, it would be confined to those portions of the subject which have not been and will not be covered in the Restatement of other subjects. The work on the Restatement of the Law of Taxation would have to be confined to the fundamental legal and constitutional principles applicable to the subject. . . ."

WORK ON STATUTES

"Our work on statutes grows out of and is a necessary complement to our work on the Restatement. The Restatement sets forth as nearly as may be the law as it is. That law is in places defective in that it does not correspond to present ideas of justice and the needs of life. Two years ago last February the Council determined to prepare whatever advisable and possible drafts of statutes to correct defects in the law as the weight of authority required us to state it in the Restatement. A year ago I was able to tell you that the Council at its mid-winter meeting had ratified an agreement made by its Executive committee with the Executive Committee of the National Conference of Commissioners on Uniform State Laws under which each organization notifies the other of the acts which it desires to draft. If the notified organization also wishes to draft the act, it arranges with the other organization for the appointment of a Reporter. Each organization appoints and is financially responsible for the expenses and any honoraria of their own Advisers. When the Reporter completes a draft the Advisers of each organization are called to the conferences which discuss it and the draft completed by this group is presented to our Council and the National Conference of Commissioners on Uniform State Laws. The tentative drafts of acts submitted by the Council for your consideration this year are the result of this agreement.

"The Executive Committee of the Conference notified us that they had been for some time at work on acts relating to airflight, asking us to cooperate with them in the completion of these acts. William A. Schnader, a member of the Conference and Chairman of its Committee on Airflight, also Chairman of the American Bar Association's Committee on Aeronautical Law, was jointly appointed Reporter. The Institute appointed its Advisers and the Conference appointed as its Advisers the other members of the Conference Committee on Airflight. There were several conferences of the groups so composed. These conferences were also attended by members of the American Bar Association's Aeronautical Committee. A proposed tentative draft was submitted to the Council for its consideration last February. After amendment, the draft was tentatively approved by the Council subject to further consideration in respect to one or two matters by its Executive Committee. The draft which you have before you is the result of the consideration given it by the Council plus the further consideration in respect to certain matters by the Executive Committee. As all these amendments made since the submission of the draft to the Council have been approved by the Reporter and by the Advisers of the Conference, the draft which you now have before you will be submitted as a tentative draft to the meeting next September of the National Conference of Commissioners on Uniform State Laws, they being informed of any amendments to this draft which you desire to have the National Conference consider. . . .

"The other tentative draft act before you is a draft of certain sections of a proposed Property Act. Work on this draft was undertaken as the result of the mutual desire of the members of our Property Group No. 1 and the Committee on Property of the National Conference of which committee Henry Upson Sims, a member of our Council, and also of Property Group No. 1, is chairman. The group working on the preliminary drafts of the sections of the act which you are now asked to consider was formed in the manner already described in connection with the work on the tenta-

tive draft of the Airflight act, except that, instead of one Reporter, three members of our Property Group No. 1, Messrs. Casner, Madden and Simes, as well as Mr. Sims, have acted as Reporters for different sections.

"Besides these two acts, tentative drafts of which are before you, work is going forward, in co-operation with the National Conference, on Contributions Between Joint Tort Feasors. We are also considering, though not in connection with the National Conference, a short act in relation to truth as a defense in civil libel. Torts Group No. 1, which has this act in charge, has been so pressed with its work on the third volume of Torts and other matters as to prevent its being able as yet to give it consideration. . . ."

EUROPEAN ANNOTATIONS TO CONFLICT OF LAWS

Under the head, "National European Annotations to the Restatement of Conflict of Laws" the report tells of a detailed plan outlined by the late A. Mendelssohn Bartholdy of Balliol College, Oxford, for the creation of six groups for annotations of this subject. "The six volumes would be written in English, the first to set forth in connection with each section of the Restatement the corresponding law of England, Scotland and Ireland; the second, similar annotations setting forth the comparative law in France, Belgium and the Netherlands; the third, the law of Sweden and Denmark; the fourth, that of the German speaking countries; the fifth, that of Italy and Spain; and the sixth, that of Russia. The report goes on:

"The practicability of such an undertaking depends on the method, the selection of the director and staff, and the budgeting provisions. Mr Bartholdy's memorandum set forth in detail his own suggestions. They appealed to me as practical. I ascertained that he would undertake to supervise the work and I felt that with the prestige of his name there was a reasonable probability that we would be able to secure the necessary funds.

"Mendelssohn Bartholdy's death will necessarily delay carrying out the plan he proposed. But his plan is so eminently worth while and so entirely practicable, that I believe we should do everything that is reasonably possible to realize its execution. The Restatement states our American law of Conflict of Laws; the annotations proposed will place within reach of the English-speaking world the law of Europe and, besides being of great and immediate value to Americans with personal or financial relations abroad, will lay the foundation for that approach to uniformity in the law of this subject so much to be desired."

TRANSLATION OF THE RESTATEMENT INTO FOREIGN LANGUAGES

"The work of W. J. Brockelbank and Pierre Wigny on the translation of our Restatement of Conflict of Laws into French has proceeded steadily throughout the year and I am informed that they expect to have all the manuscript of the translation in the hands of Professor Niboyet and his associates on the Faculty of Law of the University of Paris by September. Under our agreement with Professor Niboyet, when he is satisfied with the translation, a copy will be sent to us. We have already made arrangements for its independent examination. This independent examination will not be undertaken because of any doubt of Professor Niboyet's capacity for the work, but rather at his suggestion because of the very great difficulty of expressing in a foreign language the general concepts and nuances of our common law legal terms and phrases. Furthermore, it is of importance, if we are to authorize this first translation of any Restatement subject into a foreign language, that it may bear the stamp of extreme care and outstanding scholarly work.

"We have been in negotiation with the Kaiser-Wilhelm Institute of Foreign and Private Law in regard to its desire to superintend and publish a German translation of the Restatements; first, the Restatement of Conflict of Laws. The arrangement proposed involves the co-operation of institutions and persons in this country with German affiliations. Whether an arrangement along the lines desired by the Kaiser-Wilhelm Institute can be consummated, I do not know. The distinguished character of that Institute, however, would give to any translation published by them a high professional standing in Germany and elsewhere. From our point of view, this is essential. The interest which is being taken by foreign jurists in our work is most gratifying. . . ."

CONCLUSION

"The foregoing report deals exclusively with our Restatement work or matters growing out of that work. I have nothing new to report as to our proposed work in the field of Criminal Justice. The report which was made to us by our Advisory Committee on the subject stands as a witness of the efficient manner in which the members of the Committee carried out their task; but the work they recommended us to undertake requires very considerable financial support. We cannot start it on hopes. Besides which, it is essential in respect to work in this field, as in any other, not that the project necessarily should be a large one, but that, large or small, we know before we begin that our financial resources will enable us to accomplish something really worthwhile.

"The matters with which my report deals bring, I hope, before you what I may term the development of our Restatement work. In June, 1923, we undertook three subjects: Contracts, Conflict of Laws and Torts. We realized we were entering on

"SMILIN' THROUGH" AT AMERICAN LAW INSTITUTE MEETING AT WASHINGTON

an experiment. Many of us had faith in a modest success, but that faith was not shared by the profession generally. Today eleven volumes are already published; the work on two others is done. We have completed the Restatement of several subjects, and, while important subjects are yet to be completed or undertaken, they are limited in number.

"The completion of the Restatement itself, however, will not complete the other things which have in it the reason for their being. First, there came the demand for state annotations so essential to the present wide use of the Restatement. When completed the volume of these annotations will be far greater than the Restatement itself. More than to anyone else we owe their inception and the skillful guidance of the work on them to our Adviser on Professional Relations, Herbert F. Goodrich, his untiring work and the ability which he has to secure the co-operation of state annotators and state committees. Second, is the work on statutes now recognized as a necessary complement to the Restatement. Third, there is the work of translating the Restatement into foreign languages already begun and the work of translating into English the foreign law relating to matters treated in the Restatement of Conflict of Laws and perhaps in other subjects—a work which should not be long delayed. Truly we have built more successfully than we dreamed."

Report of Herbert F. Goodrich, Adviser on Professional Relations—Citations to Restatements—Terminology—Development of Law—Annotations Work, Etc.

THE report of Mr. Goodrich, the Institute's Adviser on Professional Relations, begins by calling attention to various facts attesting the acceptance of the Restatement as "the authoritative exposition of the present day common law." This evidence is furnished not only by writers in law reviews, but by courts, publishers of texts and publishers of various services for the use of lawyers.

"Interesting and significant bits of evidence showing the acceptance are found in many places," says the report. "The Reporter for the Pennsylvania Supreme Court now lists citations as part of the headnote of each case in which the Restatement is referred to in the decision. The Ohio Citator carries citations to the Restatement in the Ohio cases as part of the citation service for that state. The publisher of that scholarly text book Williston on Contracts emphasizes in his advertisements for the volumes, their systematic reference to the Restatement of that subject. Suggestions are made from time to time that counsel be requested or required to cite the Restatement, where relevant, in briefs to appellate courts. The judicial attitude in at least some tribunals is shown in the statement made by Mr. Justice Schaffer at the last meeting of the Pennsylvania State Bar Association. Said he: 'I can say, . . . with great confidence . . . that on any of the features of the law which have been restated by the . . . American Law Institute, in which counsel did not present in their briefs to us the text of the Restatement and the knowledge and philosophy and the decisional law from the Restatement, the briefs are not fully complete. I have found in the opinions that I have written since the Restatements came out that the Restatement and the Annotations of the Restatement, made . . . the handiest tool that I have to work with. In the vast body of decisional law that now exists, . . . as Mr. Root said in the opening session of the American Law Institute, unless such a tool is created, [sic] one cannot know how the practicing lawyer . . . or the courts can function in the future.'

"Most convincing of all is the ever increasing judicial use of the Restatement. How far it is being used as authority in the trial courts cannot be established statistically because we have no way of counting instances. We know, through repetition of dozens of experiences cited by lawyers and judges, that the use is very considerable even though it cannot be proved as to exact number. With the Appellate Courts, however, the matter can be reduced to statistics.

CITATIONS TO THE RESTATEMENT

"Through the courtesy of Mr. W. G. Packard, of the Frank Shepard Company, we can give the latest tabulation with regard to citations of the Restatement. On April 28th there were 459 citations by the Federal Courts, 3023 by the state courts, making a total of 3482 court citations. Law Review citations numbered 6956. The total is 10,438.

"Figures showing the breakdown of these totals into the citations of the various subjects are not available for the last recapitulation, but an inspection of tables furnished previously, however, shows the trend with accuracy. The first thing it shows is that citations have accumulated with immense acceleration since 1934. That is to be expected for many courts did not have material available and some are reluctant to cite material still in tentative draft form. The division

among subjects is interesting. Contracts is by far the subject cited most frequently. Torts comes next and Agency a very little distance behind. Conflict of Laws follows with Trusts close up on it."

TERMINOLOGY OF PROPERTY RESTATEMENT

The report then takes up the Restatement of Property and speaks of the ever-present problem of terminology. The Property people, it says, have followed the terminology of the late Professor Hohfeld, believing it to be the most accurate expression of their ideas. But it is not easy, and many readers unfamiliar with it will doubtless receive it at first with sharp criticism. But, it adds:

"It is to be hoped that those of us interested in the Institute's program have now thought our way through this problem of nomenclature thoroughly enough not to be disturbed at every criticism based upon our effort to use terms with precision. We know if the Restatement is to help the law to attain clearness it must be written with much more accuracy of language than we have been accustomed to use in discussing legal problems. Looseness of terminology has been one of the greatest sources of confusion in the law. The Restatement, from the start, has been shaped, with the objectives of exactness and precision in mind.

"That the necessity of committing one's self to some changes in legal terminology may slow up the use of the Restatement among some of our users may be granted. Lawyers are not less conservative than other people and we all dislike changes in our mental habits. But that such exactness of terminology will, in the long run, very greatly increase the scientific value of the Restatement is beyond serious dispute."

THE RESTATEMENT AND DEVELOPMENT OF LAW

The suggestion that the Restatement of the law would tend to crystallize it is next taken up. "Such a suggestion is or is not an adverse criticism of the project of Restatement, depending upon what one regards as crystallization. If it means that doubts and uncertainties are reduced, this crystallization is highly desirable indeed. If restatement involves pouring the law into such a mold that it can no longer grow and adapt itself to changing situations, to that extent Restatement is highly undesirable." The report adds:

"We have had, during the past year, a Supreme Court decision which shows very distinctly that the danger of stopping development of the law by Restatement has been greatly over-estimated. The instance is the Supreme Court decision in Milwaukee County vs. M. E. White Company, 296 U. S. 268. . . Milwaukee County brought an action against the defendant in a Wisconsin court and secured judgment in its favor upon a claim for an unpaid Wisconsin income tax. It sued the defendant upon this judgment in the Federal District Court in Illinois, where the action was dismissed upon the ground that the suit was in substance brought to enforce the revenue laws of Wisconsin. The United States Supreme Court, in a very strong opinion written by Mr. Justice Stone, held that the dismissal was improper and that the judgment was entitled to full faith and credit in Illinois.[1]

"Under the hitherto orthodox view the claim for unpaid taxes, even though made a personal obligation by the taxing state, could not be sued upon in the courts of another state. Restatement, Conflict of Laws, § 610, Comment *c*. This was the rule thought to be applicable even though a judgment had been recovered by the taxing state. The question had come up just as we were finishing Conflict of Laws and a decision which seemed to look the other way (New York vs. Coe Manufacturing Company, 112 N. J. L. 536, 172 Atl. 198), was explained as a judgment upon a claim for payment of a privilege given by the state for a price.

"Milwaukee County vs. White makes this rule obsolete. The Supreme Court decision carries the law beyond that which appears in the Restatement.

". . . This is just the sort of thing which many of us hoped and predicted would happen with regard to the judicial use of the Restatement. There are many instances in the Restatement where the rule of law as worked out by the courts is not that which the draftsmen of the Restatement would choose to make the law. If the authority is clear, the law has nevertheless been stated as the courts have declared it to be. If the point is not clearly established there has been more latitude in carrying the Restatement beyond the precise holding of the decisions. In either event, the aim has been to state the law as it is thought now to be, with the confident expectation that courts would advance it when advancing became necessary. Milwaukee County vs. M. E. White Company marks a definite step and a desirable step in that advance.

ANNOTATIONS WORK

"The past year is the best year which we have ever had in the production of the State Annotations. During the fall appeared: Agency: Indiana, Massachusetts and Pennsylvania; Conflict of Laws: Colorado, Indiana and Texas; Contracts: New Jersey; Torts: Missouri; Trusts: Massachusetts. This spring there has just come from the press ten more which are as follows: Agency: California; Conflict of Laws: Louisiana, Maryland, Missouri, Oklahoma, West Virginia and Wisconsin; Contracts: Alabama and South Dakota; Trusts: Mississippi.

"The Restatement of the Law is a contribution to legal science which will succeed and is succeeding on its own merits. In other words, the value of the Restatement is not dependent upon the fact of an accompanying annotation in a given state. But it is still true

(*Continued on page* 476)

1. This statement of facts, and a portion of the comment upon the case is taken from the article on Conflict of Laws in the February, 1937, *American Bar Association Journal.*

AMERICAN BAR ASSOCIATION JOVRNAL

BOARD OF EDITORS

EDGAR B. TOLMAN, Editor-in-Chief.....Chicago, Ill.
R. E. LEE SANER, Chairman.....Dallas, Texas
FREDERICK H. STINCHFIELD, President, Ex-Of.....Minneapolis
GEORGE MAURICE MORRIS, Chairman House of Delegates, Ex-Of.....Washington, D. C.
HERMAN OLIPHANT.....Washington, D. C.
GURNEY E. NEWLIN.....Los Angeles, Cal.
CHARLES P. MEGAN.....Chicago, Ill.
WALTER P. ARMSTRONG.....Memphis, Tenn.

Subscription price to individuals, not members of the Association, $3 a year. To those who are members of the Association the price is $1.50 and is included in their annual dues. Price per copy, 25 cents.

JOSEPH R. TAYLOR
MANAGING EDITOR
Journal Office: 1140 N. Dearborn Street
Chicago, Illinois

THERE CAN BE NO "COMPROMISE"

Public opinion throughout the United States has defeated the re-making of the Supreme Court along the lines proposed in the Message of February 5, 1937. Increase of the membership of the Court to fifteen is not likely. The patriotic and decisive action of the Judiciary Committee of the Senate gave effect to the militant views of the people throughout the country, irrespective of political affiliations, locality, or occupation. In protesting the passage of such a measure, the lawyers voted and spoke effectively the views of the rank and file of the people in their communities.

But the attempt to re-make the Court along political lines and to render its personnel predominantly subservient to the Executive has not been defeated, nor has it been abandoned. So-called "compromises" have been brought forward, to accomplish the same destructive result, through more artful if no less flagrant methods.

Acceptance of any of them would not be "compromise" but surrender. Either the great Court should be saved as an independent, impartial, law-governed arbiter of the rights of citizens and the powers of government, or its subordination to the policy-determining branches or branch of government should be frankly established. There is no "compromise" in any measure which changes the size or personnel of the Court through action by the Congress at the demand of the Executive, without letting the States and people decide for or against the change through the proposing of a constitutional amendment.

Any manner of legislative re-making of the Court under present circumstances would be *defeat* for the American form of government. Change in the method of accomplishing that subversion should not be referred to as "compromise." The principle of an independent judiciary is all-important; the Court will either remain free or it will not; the principle of independence does not depend on the number of justices added.

Some of the so-called "compromise" measures confirm the purposes of the original proposal and would even enhance their accomplishment. For example: It is proposed that the increase in the Court shall not be "permanent," and that after the additional justices have been appointed, no successor to any present justice retiring shall be appointed until the membership of the Court has been restored to nine. Such a proposal shows clearly that the dominant purpose has been to add new members to the Court now; the "modification" would ensure that the justices now added would soon be a majority of a Court of nine.

If the effort to save the Court is not ended by some agile and easy surrender of the vital principle, the indications are for a long fight in the Congress. Opponents of the political re-making of the Court will perform a high public duty if they stand firm against any so-called "compromise" and resist to the uttermost. At almost any time, the issue may become acute in the House of Representatives. Citizens who wish to help save the Court should immediately acquaint their Congressmen with their views as to so-called "compromise." Members of the Judiciary Committee and the Rules Committee of the House of Representatives are public servants who have shown a patriotic devotion to the institutions which safeguard liberty in their country. There is every reason to hope that they will stand firm, as their compatriots in the Judiciary Committee of the Senate have so valiantly done.

A sensible and patriotic solution, not at all in the nature of "compromise," would be an agreement that whatever is deemed desirable as to changes in the structure of the Court shall be proposed as a constitutional amendment, so that the States and the people may decide whether such a thing shall be done. Such a course would enable the Congress to resume its normal functions of legislation, now clogged by the Court controversy. Only the people should change the structure of their great Court.

MR. JUSTICE VAN DEVANTER RETIRES

At a time when the attention of the country was considerably engrossed in the Nation's great Court, one of its best loved members announced that he would retire from active service when the work of the current term was finished. Twenty-six years of service in the Court, forty years of continuous service to the United States, and a still longer period of work when we include his practice at the Bar and his service on the bench of his State, led Mr. Justice Van Devanter to feel justly that, at the age of seventy-eight, his commission could be deemed to be fulfilled and himself entitled to enjoy leisure and the company of friends. With characteristic integrity of mind, he neither hastened nor withheld his retirement because controversy swirls round the Court. He had been unusually active in the work of the Court during the term just ending. Like Mr. Justice Holmes, he chose to leave the Court while his work and his faculties were keen and unimpaired.

The passing of such a member of the great tribunal serves to emphasize the flight of time and the epoch-marking changes which make and re-make America. Born at a time when Oregon was coming into the Union and the possibility of an independent republic on the Pacific Coast had just been quelled, a time when the Dred Scott decision and John Brown's raid had aroused animosities which could be quenched only in Civil War, the young son of an Indiana lawyer looked out on a Nation of 32,000,000 people, among whom four million men and women were owned by others. Early in young manhood, he cast his fortunes with the great, free West, to which all his life was loyal. In the making of the institutions and the laws of his adopted State of Wyoming, and in the development of a Western leadership in National affairs, he took a rugged and conspicuous part. Long after he had become the leading authority in the Court as to its history, rules, traditions, and procedure, he was never so happy as when there was allotted to him the preparation of an opinion for which the background was his knowledge of the atmosphere, people, and resources of his beloved West.

This is neither time nor place for appraisal of the enduring quality of the work of this kindly and devoted public servant. Those who have disagreed with many of his conclusions have respected his independence and honesty of purpose and his rare faculty for fair and keen analysis of intricate situations through oral discussion. Mr. Justice Van Devanter came to judicial work from an environment where sincerity, sense of fairness, consideration for others, passion for justice, and constancy of convictions on fundamentals, were prime virtues; and his possession of those homely but admirable qualities won and held for him the genuine affection of the lawyers who came before the Court. In a period when cases in Court were argued in Court and were swayed by the enlightened development of precedents, he was truly a lawyer's judge. Conditions and needs in the country might change and did change, but never his quiet, constant, friendly devotion to the essentials of "Equal justice under law." Unless it is unhappily brought about that the Court must be of one mind, and that perchance a mind outside the Court, such a jurist renders truly great service, as one of the members of the Court.

Mr. Justice Van Devanter has retired from service in the Court. Under the terms of the Sumners-McCarran law, advocated by the American Bar Association last August and approved strongly by its members through their voting by mail last March,

he remains available for judicial work upon assignment by the Chief Justice. Most of all, the legion of lawyers and other citizens who came to admire and respect his sturdy qualities will wish for him a long and rich enjoyment of leisure so fully earned.

THE MEMBERSHIP OF THE ASSOCIATION

Members of the Association often ask: What can I, as an individual member, do to show my support of the Association in its efforts against the re-making of the Supreme Court?

What can I do to show my approval and support of the reorganized and democratic structure of the Association, under which the members decide and control its policies?

Such questions are given a practical answer by saying that each member can do a great deal, for the Association and for the profession, by bringing about applications for membership, on the part of lawyers who would be desirable members. In every town and city, and in almost every law firm and office, there are lawyers who should be members of the Association but are not. In most or many instances, they have never been invited to join, by any lawyer in their community.

In the recent referendum upon the Court issues, about 52,000 non-members showed their interest in the Association, by utilizing it as the means of voting their views upon questions of great importance to the profession and the public. The mail ballots, with signature slips personally signed, came in from every State and locality. Most of these 52,000 lawyers should be secured as members. This can be done only if each of the present members does what he can to interest and enroll new members.

The Association needs many new members immediately, to increase its resources for its broadened activities and to make the Association membership more fully representative of the profession of law. About 90,000 lawyers are represented in the House of Delegates, through their chosen representatives; but the membership of the Association is a little more than 30,000. This disparity should be greatly reduced; likewise, the disparity between the Association membership and the number of non-members voting in the referendum.

On June 15th, the polls will close in the mail balloting by the members of the Association in the States of Arkansas, Illinois, Maryland, and West Virginia, for the election of State Delegates for an unexpired term to end with the 1938 annual meeting. In three of the four States, there are opposing candidates. The nominations were made by petitions signed by members of the Association in good standing, and a ballot bearing the names of the nominees in a State has been sent to every member in good standing in that State. Next year the nomination of candidates for State Delegates will be made by petition, and the nominees will be voted for and elected by mail ballot, of the Association members in each of the 48 States, the District of Columbia, Hawaii, and the Territorial group.

Many lawyers not now members will be glad to make application, so as to be able to take part next year in the signing of nominating petitions and in the mail voting for State Delegates, as well as in such referenda as are from time to time conducted by the Association among its members. A non-member disfranchises himself from voting on matters which vitally affect him. Incidentally, it may be mentioned that in one of the four States in which a vacancy in the office of State Delegate is now being filled, a petition placing a well-known lawyer in nomination was necessarily rejected by the Board of Elections, for insufficiency of the qualified signers in good standing in Association membership.

Under the Association's new system of nominating and electing State Delegates and of voting by mail upon major questions of policy, membership in the Association will be welcomed by many non-members; and present members will wish to keep themselves in good standing, through the prompt payment of dues.

RECEPTION BY THE COURTS OF THE RESTATEMENT OF TRUSTS

The Restatement Has Been Quoted or Cited by the Courts of a Majority of the States as Well as in Decisions of the Supreme Court of the United States and the Lower Federal Courts—Definitions and Distinctions—The Creation of a Trust—Spendthrift Trusts—Administration—Successive Beneficiaries—Liabilities to and of Third Persons—Termination of the Trust—Charitable and Resulting Trusts—Evidence Shows Influence of Restatement Is Increasing.

By Austin W. Scott
Reporter for American Law Institute's Restatement of Trusts

THE tentative drafts of the Restatement of Trusts began to appear in 1930, but the final and official draft was not published until the fall of 1935. The courts in various states have not infrequently cited the provisions of the tentative drafts, but since the official draft was published, the citations have greatly increased. The Restatement of Trusts has been quoted or cited by the courts of a majority of the states as well as in decisions of the Supreme Court of the United States and the lower federal courts. As the judges and the lawyers have gradually become familiar with the Restatement, its influence has apparently grown. It is my purpose to consider some of the important principles stated in the Restatement of Trusts and their application by the courts in specific cases.

DEFINITIONS AND DISTINCTIONS

In the first chapter of the Restatement of Trusts some of the terms used in the Restatement are defined, and distinctions are drawn between trusts and other relationships which more or less closely resemble trusts. The courts have in several cases cited with approval the definition of a trust as stated in § 2.[1] As to the distinctions between a trust and other relationships, the courts have approved of the statement of the distinction between a trust and an executorship, as stated in § 6,[2] and between a trust and an agency, as stated in § 8.[3] The section which has been most frequently relied upon, however, is § 12 which deals with the distinction between a trust and a debt. In most of the cases the distinction is of importance because one who is entrusted with money, usually a bank, has become insolvent, and the depositor has sought to obtain a preference over the general creditors of the insolvent. As a result of the depression the cases involving claims against failed banks became exceedingly numerous and the question of priorities became acute. In the cases the courts have frequently quoted the statement in § 12, Comment *g*, that "If one person pays money to another, it depends upon the manifested intention of the parties whether a trust or a debt is created. If the intention is that the money shall be kept or used as a separate fund for the benefit of the payor or a third person, a trust is created. If the intention is that the person receiving the money shall have the unrestricted use thereof, being liable to pay a similar amount whether with or without interest to the payor or to a third person, a debt is created." Moreover, the courts have frequently quoted from § 12, Comment *h*, which deals specifically with bank deposits and which states that a general deposit does not create a trust, and that even in the case of a deposit for a special purpose the bank is a trustee only if it is the understanding of the parties that the money deposited is not to be used by the bank for its own purposes. The difficulty in any particular case is, of course, to ascertain the understanding of the parties when, as usually happens, that understanding is not explicitly stated but must be gathered from the character of the transaction. The courts which have relied upon § 12 of the Restatement have shown a disposition not to permit a preference unless it appears that the bank was not intended to use as its own the funds deposited. In a majority of the cases in which § 12 is cited, the courts have held that a debt and not a trust was created.[4] In a few cases it has been held that the understanding of the parties was that the money deposited was to be held in trust by the bank.[5]

THE CREATION OF A TRUST

It is stated in the Restatement that a trust is created only if the settlor properly manifests an intention to create a trust, but that no particular form of words or conduct is necessary for the manifestation of such intention, provided that there is a manifestation of intention to impose enforceable duties. See restatement of Trusts, §§ 23-25. These sections have been relied

1. Continental Casualty Co. v. Powell, 83 F. (2d) 652 (C. C. A. 4th, 1936), *aff'g* Guaranty Trust Co. of New York v. Seaboard Air Line Railway Co., 14 F. Supp. 555 (D. C. E. D. Va., 1935); Goodenough v. Union Guardian Trust Co., 275 Mich., 668, 267 N. W. 772 (1936).

2. *In re* Estate of Janke, 193 Minn. 201, 258 N. W. 311 (1935).

3. Minneapolis Fire & Marine Insurance Co. v. Bank of Dawson, 193 Minn. 14, 257 N. W. 510 (1934).

4. Leo v. Pearce Stores Co., 54 F. (2d) 92 (D. C. Mich., 1931); Continental Casualty Co. v. Powell, 83 F. (2d) 652 (C. C. A. 4th, 1936), *aff'g* Guaranty Trust Co. of New York v. Seaboard Air Line Railway Co., 14 F. Supp. 555 (D. C. E. D., Va., 1935); Great Atlantic & Pacific Tea Co. v. Citizens' National Bank, 2 F. Supp. 29 (D. C. W. D., Pa., 1932); Doty v. Ghingher, 166 Md. 426, 171 Atl. 40 (1934); *In re* State Bank of Elkhorn, 129 Neb. 506, 262 N. W. 15 (1935); Squire v. Oxenreiter, 130 Ohio St. 475, 200 N. E. 503 (1936); Squire v. American Express Co., 131 Ohio St. 239, 2 N. E. (2d) 766 (1936); Fulton v. Busher, 47 Ohio App. 169, 191 N. E. 475 (1933), *aff'd* Busher v. Fulton, 128 Ohio St. 485, 191 N. E. 752 (1934); Guardian Trust Co. v. Kirby, 50 Ohio App. 539, 199 N. E. 81 (1935); Gartner v. Cassatt, 313 Pa. 491, 169 Atl. 889 (1934); Bair v. Snyder County State Bank, 314 Pa. 85, 171 Atl. 274 (1934); Cambridge Gas Co. v. Lamb, 184 S. E. 566 (W. Va., 1936).

5. City of Canby v. Bank of Canby, 192 Minn. 571, 257 N. W. 520 (1934); Squire v. American Express Co., 131 Ohio St. 239, 2 N. E. (2d) 766 (1936).

upon by the courts in a number of cases.[6] In some of the cases the courts pointed out that the settlor may intend to create a trust even though he uses precatory rather than imperative language, but the language may be such that it appears that the settlor intended to impose only a moral and not a legal obligation.

As is pointed out in the Restatement, consideration is not necessary for the creation of a trust, but a promise to create a trust in the future is not enforceable if gratuitous. See Restatement of Trusts, §§ 28-30. These sections are relied upon in a recent case.[7]

A trust cannot be created by a testamentary disposition unless the requirements of the Statute of Wills are complied with, whether there is a will in which the terms of the trust are not stated or there is an attempt to create a trust *inter vivos* which is really testamentary in character. See Restatement of Trusts, §§ 53-58. The courts have cited and followed these sections in holding that a trust is not testamentary merely because the settlor reserves a beneficial life estate,[8] or because he creates a so-called "tentative trust" by depositing money in a savings account in his name as trustee for another.[9]

A trust cannot be created unless there is trust property. As is stated in § 77, however, an undivided interest can be the subject matter of a trust, as has been held by a recent federal case[10] in which this section was cited. An interest which is subject to be divested, like the interest of the beneficiary of a life insurance policy where the insured reserves power to change the beneficiary, may be the subject matter of a trust as is stated in § 84, which is relied upon in a recent case.[11] In another recent case[12] the court upheld a life insurance trust, but did not cite this section of the Restatement, although it relied upon other sections which dealt with other questions in regard to the validity of the trust in question.

Although a trust cannot be created unless there is a beneficiary of the trust, an unincorporated association may be such beneficiary. See Restatement of Trusts, § 119. This section was applied in a recent case.[13]

SPENDTHRIFT TRUSTS

There have been a number of recent cases in which the courts have dealt with the question whether the wife or children of a beneficiary of a spendthrift trust can reach his interest to satisfy a claim for alimony or support. It is stated in § 157, which is cited in these cases, that the interest of the beneficiary can be reached to satisfy such claims, although ordinary creditors of the beneficiary cannot reach it. There is among the courts a difference of opinion on this question. In permitting the wife or children to reach the interest of the beneficiary, the courts have sometimes held that the settlor in creating the trust did not intend to exclude the wife or children but merely intended to exclude ordinary creditors. In some of the cases the courts have taken the view that regardless of the settlor's intent, it is against public policy to permit the beneficiary to enjoy the income from the trust and refuse to support his wife and children. Both grounds are stated in two recent cases which cite the Restatement.[14] In Minnesota, however, the court held that the wife of the beneficiary of a spendthrift trust could not reach his interest to enforce her claim for alimony and support, and rejected the rule stated in the Restatement.[15] The court said that if such a claim is to be an exception to the protection offered by spendthrift provisions it must be by some justifiable interpretation of the donor's language by which such implied exception may be fairly construed into the instrument of trust. As far as the intention of the donor went, it may well be that he intended to exclude all claimants including the wife and children of the beneficiary. The question still remains, however, whether the policy requiring a man to support his dependents does not outweigh the policy against permitting the settlor to do as he likes with his property, the view which is taken in the Restatement and which has been followed in other courts. In Massachusetts the court took an intermediate view in a recent case in which the Restatement was not cited.[16] In that case the court held that the divorced wife of the beneficiary of a spendthrift trust who had obtained a decree for alimony in another state could not maintain a bill in equity to compel the trustee to pay her the full amount of the claim out of her husband's interest under the trust. The court dismissed the bill without prejudice, however, and suggested that she might be entitled to a reasonable amount out of the trust fund for her support, as she would be entitled if the trust had been created for the support of her husband and his dependents. The Court of Appeals in New York has cited § 157 with approval, stating that where a trust is created in favor of a beneficiary and his dependents, the provision for the dependents adds nothing, since even if they were not mentioned they would have been entitled to support out of the trust.[17]

THE ADMINISTRATION OF THE TRUST

It is stated in § 167 of the Restatement of Trusts that although the extent of the powers of the trustee are determined by the terms of the trust, yet the court may permit a deviation from the terms of the trust if owing to circumstances not known to the settlor and not anticipated by him compliance would defeat or substantially impair the accomplishment of the purposes of the trust. This section has been quoted and followed in a recent Texas case[18] where the court permitted the trustee to mortgage a building in order to pay taxes and make repairs and improvements, although a power to mortgage was not conferred by the terms of the trust, since the building could not be rented without such repairs and improvements and was in danger of being sold for taxes. So also, in a recent Wisconsin case[19]

6. Bradley v. Hill, 141 Kan. 602, 42 P. (2d) 580 (1935); Williams v. Williams' Committee, 253 Ky. 30, 68 S. W. (2d) 395 (1933); Jordan v. Jordan, 193 Minn. 428, 259 N. W. 386 (1935); Brubaker v. Lauver, 185 Atl. 848 (Pa., 1936).

7. De Leuil's Ex'rs v. De Leuil, 255 Ky. 406, 74 S. W. (2d) 474 (1934); Schram v. Pearl Oil Corporation, 90 S. W. (2d) 846 (Tex. Civ. App., 1936).

8. Moore v. Hayes, 138 Kan. 327, 26 P. (2d) 254 (1933).

9. Scanlon's Estate, 313 Pa. 424, 169 Atl. 106 (1933); *In re* Pozzuto's Estate, 188 Atl. 209 (Pa., 1936).

10. Commissioner of Internal Revenue v. McIlvaine, 78 F. (2d) 787 (C. C. A. 7th, 1935).

11. Carter v. Carter, 321 Pa. 391, 184 Atl. 78 (1936).

12. *In re* Reynolds' Estate, 268 N. W. 480 (Neb., 1936).

13. Wilbur v. Portland Trust Co., 121 Conn. 535, 186 Atl. 499 (1936).

14. Keller v. Keller, 284 Ill. App. 198, 1 N. E. (2d) 773 (1936); Thomas v. Thomas, 112 Pa. Super. 578, 172 Atl. 36 (1934).

15. Erickson v. Erickson, 266 N. W. 161, 267 N. W. 426 (Minn., 1936).

16. Bucknam v. Bucknam, 200 N. E. 918, 104 A. L. R. 774 (Mass., 1936).

17. Matter of Sand v. Beach, 270 N. Y. 281, 200 N. E. 821 (1936).

18. Smith v. Drake, 94 S. W. (2d) 236 (Tex. Civ. App., 1936).

19. Will of Stack, 217 Wis. 94, 258 N. W. 324, 97 A. L. R. 316 (1935).

the court permitted a deviation from the terms of the trust for similar reasons.

The primary duty of a trustee is to administer the trust solely in the interest of the beneficiaries. This duty of loyalty is stated in § 170 of the Restatement. This rule is applicable not only to trustees but to other fiduciaries. It has been quoted with approval in recent cases involving a guardian,[20] a corporate director,[21] and an executor.[22] In the case last cited it was held that where a testator owned 498 out of 500 shares of a corporation and beqeathed 249 shares to his daughter and the same amount to his executrix, the executrix was not precluded from purchasing the two remaining shares from a third person, although the result was that she obtained the controlling interest in the corporation.

Another duty of the trustee is, as stated in § 179, his duty to keep the trust property separate from his individual property and so far as it is reasonable to do so to see that it is earmarked as property of the trust. This section has been cited in several recent cases in which the trustee took title to mortgages in its own name, and allocated the mortgage or participations in the mortgage to the trusts of which it was trustee. When the mortgages depreciated in value as the result of the depression in the real estate market, the beneficiaries sought to surcharge the trustee. Several grounds for such surcharge have been urged. It has been urged that the trustee is guilty of self-dealing if it first purchased the mortgage with its own funds and subsequently allocated it or a share of it to the trust. It has also been urged that the investment in a share of a mortgage is not a proper trust investment. The ground principally urged, however, is that the investment is not properly earmarked where the mortgage is taken in the name of the trustee individually, and the interests of the beneficiaries are indicated on the books of the trustee or by a declaration of trust executed by it or by the issue of a certificate showing the participating shares so allocated. The courts are not altogether agreed on the question whether the trustee was guilty of a breach of trust, and whether if so it is subject to a surcharge. In Massachusetts it was held that the trustee was not guilty of a breach of trust.[23] The court said that an investment in a participating interest in a mortgage is not an improper investment, citing the Restatement, § 227, Comment *j*. The court said, moreover, that the loss which resulted from the investment was not due to the conduct of the trustee but was due to general financial conditions, and on this cited the Restatement, § 179, Comment *d*. In a Connecticut case[24] where a trust company had invested in entire mortgages and mortgage participations in its own name, the court held that the trustee thereby committed a breach of trust in its failure to earmark the investments, citing § 179. The court held, however, that the trustee was not subject to a surcharge for the amount of the depreciation in value of the mortgages, since that depreciation resulted from general conditions and not from the failure to earmark the investments, and on this the court cited § 179, Comment *d*. A similar result was reached in a Pennsylvania case[25] in which the court said that the failure to earmark constituted a breach of trust, but that the trustee was not subject to a surcharge for the depreciation in value which resulted from general economic conditions, relying upon § 179, Comment *d*. In an earlier case[26] the court had held the trustee subject to a surcharge.

As to the extent of the liability of the trustee for a breach of trust in selling or failing to sell trust property, the provisions of §§ 208 and 209 of the Restatement were followed in a recent New York case.[27] In that case it was the duty of the trustee to sell shares of the American Radiator Company in order to pay an inheritance tax of about $225,000. The average price at which he could have sold the shares was about $25, so that 9,000 shares should have been sold. The trustee later sold about 22,500 shares at about $10 a share. His delay in selling the shares made it necessary, therefore, to sell about 13,500 shares more than would otherwise have been necessary. At the time of the decree the shares were selling for about $17, The court held that as to the 9,000 shares the trustee was liable for the loss of $15 a share, since that was the loss resulting from his failure to sell these shares, citing § 209. As to the 13,500 shares which would have been retained if the trustee had not committed a breach of trust, he was liable for the difference between the price at which he sold and the value at the time of the decree, or about $7 a share, citing § 208. The result is to put the beneficiaries in the position in which they would have been if no breach of trust had been committed.

Even though the trustee commits a breach of trust, he cannot be held liable therefor by a competent beneficiary who with full knowledge consents to or subsequently acquiesces in the conduct of the trustee. It is so stated in §§ 216 and 218 of the Restatement, and these sections have been cited with approval and applied by the courts in several recent cases.[28] Section 218 was cited by Mr. Justice Cardozo in a recent case in the Supreme Court of the United States[29] in a dissenting opinion. The majority of the court did not challenge the rule stated in this section.

Although the trustee commits a breach of trust he may be relieved of liability by an exculpatory provision in the trust instrument. As is stated in § 222, however, such a provision is not effective to relieve the trustee of liability for breach of trust committed in bad faith or intentionally or with reckless indifference to the interest of the beneficiary. This section is cited and applied in cases in which the trustee was guilty only of ordinary negligence and was therefore held not liable;[30] but the trustee was held liable in another case in which he was guilty of a reckless or wilful abuse.[31] In New York a statute recently enacted provides that a provision attempting to exonerate a testamentary trustee from liability for failure to exercise reasonable

20. *In re* Filardo, 221 Wis. 589, 267 N. W. 312, 105 A. L. R. 438 (1936).

21. Hotchkiss v. Fischer, 136 Kan. 530, 16 P. (2d) 531 (1932).

22. *In re* Johnson's Estate, 60 P. (2d) 271 (Wash., 1936).

23. Springfield Safe Deposit & Trust Co. v. First Unitarian Society, 200 N. E. 541 (Mass., 1936).

24. Chapter House Circle v. Hartford National Bank & Trust Co., 121 Conn. 558, 186 Atl. 543 (1936).

25. Guthrie's Estate, 320 Pa. 530, 182 Atl. 248, 103 A. L. R. 1186 (1936).

26. Yost's Estate, 316 Pa. 463, 175 Atl. 383 (1934).

27. Chemical Bank & Trust Co. v. Ott, 248 App. Div. 406, 289 N. Y. Supp. 228 (1936).

28. Macfarlane's Estate, 317 Pa. 377, 177 Atl. 12 (1935); Stephen's Estate, 320 Pa. 97, 181 Atl. 559 (1935); *In re* Strawbridge's Estate, 185 Atl. 726 (Pa., 1936).

29. Freuler v. Helvering, 291 U. S. 35, 54 S. Ct. 308, 78 L. Ed. 634 (1934).

30. Fleener v. Omaha National Co., 267 N. W. 462 (Neb., 1936); Hazzard v. Chase National Bank, 159 Misc. 57, 287 N. Y. Supp. 541 (1936).

31. Matter of Andrus, 156 Misc. 268, 281 N. Y. Supp. 831 (1935).

care, diligence and prudence is against public policy.[32] This provision goes beyond the rule stated in § 222 since it is applicable where the trustee is guilty of ordinary negligence.

Where a trustee holds shares of stock which he can properly retain in the trust, but the corporation is merged with another corporation and new shares are issued, or where he holds securities of a corporation which is reorganized and new securities are issued, the authority to retain the old securities extends to the new securities if, but only if, they are substantially equivalent. It is so stated in § 231, Comments *f* and *g*, which were cited and applied in two Pennsylvania cases, in one of which the new securities were held to be substantially equivalent to the old,[33] and in the other they were held to be substantially different.[34]

SUCCESSIVE BENEFICIARIES

In the Restatement of Trusts, § 234, Comment *g*, it is stated that where a testator leaves the residue of his property in trust to pay the income to a beneficiary for life, with remainders over, income received during the period of administration from property which is subsequently used in paying legacies and discharging debts and expenses of administration is to be treated as principal and not as income. This is the rule which is accepted in England and Connecticut and Maryland and perhaps in New Jersey, and was the rule in New York until changed by statute in 1931. It has been rejected in Massachusetts and Rhode Island. In a recent case in North Carolina[35] the court followed the Massachusetts rule. The Chief Justice dissented, stating that the rule as stated in the Restatement should be followed.

Where the trust estate includes wasting property, the trustee is ordinarily under a duty either to make provision for amortization or to sell the property and invest the proceeds in property which is not of a wasting character, since otherwise the life beneficiary would profit at the expense of the beneficiary entitled in remainder. See Restatement of Trusts, § 239. The question recently arose in New York[36] whether a building should be treated as wasting property, and whether the trustee was justified in setting aside out of income a fund for depreciation. The court held that it was not wasting property under the rule stated in § 239, and that the life beneficiary was entitled to receive as income the amount which the trustees had set aside as a sinking fund. This question was discussed at a meeting of the Members of the Institute, and it was decided that the authorities did not justify a statement that buildings were to be treated as wasting property.

LIABILITIES TO THIRD PERSONS

Where a liability is incurred to a third person in the administration of the trust, the liability is ordinarily that of the trustee personally, although the third person may under proper circumstances reach the trust estate and apply it to the satisfaction of his claim. See Restatement of Trusts, §§ 261-279. The trustee is personally liable on contracts made by him in the administration of the trust, unless it is otherwise agreed. The question whether the terms of the contract are such as to relieve the trustee of personal liability is not always easy to answer. It is generally held that the addition of words to the trustee's name indicating that he is trustee is not sufficient to exempt him. By the Negotiable Instruments Law, however, it is provided that where a person adds to his signature words indicating that he signs in a representative capacity, he is not liable on the instrument if he was duly authorized. In § 263, Comment *e*, of the Restatement it is stated that this provision is applicable to trustees. It was so held in a recent case decided by the Circuit Court of Appeals for the Fourth Circuit.[37] In that case a promissory note was signed by the three defendants as "Trustees High Street Baptist Church." The defendants were authorized by a resolution of the congregation of the church, which was an unincorporated society, to sign the note which was given for the purchase of an organ. The court held that the defendants were not personally liable, citing the Restatement. The opposite result, however, was reached in a case in Mississippi.[38]

Although the authorities are numerous as to the personal liability of a trustee to a third person in contract and in tort, authorities on the question whether a trustee is personally liable where an obligation is imposed upon the owner of property as such are not numerous. In § 265 of the Restatement of Trusts it is stated that the trustee as holder of the title to the trust property is subject to personal liability to third persons, at least to the extent to which the trust estate is sufficient to indemnify him. In a caveat it is stated that no opinion is expressed on the question whether the trustee is personally liable where the trust estate is insufficient to indemnify him and where he was not personally at fault in incurring the liability. In a recent Minnesota case[39] the court held the trustee liable even though the trust estate was insufficient to indemnify him. In that case an assignee of a lease bequeathed it to a trust company in trust. The landlord sued the trustee for rent. The trustee contended that it should not be liable except to the extent to which the trust estate was sufficient to indemnify it, that it should be liable only in its representative capacity. The court held, however, that the trustee was personally liable on the covenant to pay rent which ran with the land, and that it was immaterial that it held the lease as trustee.

Where the trustee incurs a personal liability to a third person in the administration of the trust, the third person having obtained a judgment in an action at law against the trustee personally cannot levy execution upon the trust estate. It was so held in a case in West Virginia[40] which cites the rule to that effect stated in the Restatement of Trusts, § 266. Under proper circumstances, however, the third person can by a proceeding in equity reach the trust estate, as stated in §§ 267-273.

LIABILITIES OF THIRD PERSONS

In Chapter 9 of the Restatement the rules relating to the liabilities of third persons to whom trust property is transferred by the trustee in breach of trust, or who otherwise participate in a breach of trust, are stated at length. The special rules applicable to depositories of trust funds are stated in § 324. Where a trustee deposits trust funds in a bank, the bank is liable for

32. New York Laws, 1936, c. 378.
33. Macfarlane's Estate, 317 Pa. 377, 177 Atl. 12 (1935).
34. *In re* Scott's Trust, 322 Pa. 1, 184 Atl. 245 (1936).
35. Wachovia Bank & Trust Co. v. Jones, 210 N. C. 339, 186 S. E. 335, 105 A. L. R. 1189 (1936).
36. Matter of Edgar, 157 Misc. 10, 282 N. Y. Supp. 795 (1935).
37. Hawthorne v. Austin Organ Co., 71 F. (2d) 945 (C. C. A. 4th, 1934), *certiorari* denied Austin Organ Co. v. Hawthorne, 293 U. S. 623, 55 S. Ct. 237, 79 L. Ed. 710 (1934).
38. Peeples v. Enochs, 170 Miss. 472, 153 So. 796 (1934).
39. McLaughlin v. Minnesota Loan & Trust Co., 192 Minn. 203, 255 N. W. 839 (1934).
40. Smith v. Chambers, 185 S. E. 211 (W. Va., 1936).

participation in a breach of trust committed by the trustee in making deposits or withdrawals if, but only if, the bank had notice of the breach of trust. This section and the comments to it were cited and applied by the courts in two recent cases.[41] The federal case involved deposits and withdrawals made by a defaulting county treasurer, and the Texas case involved the treasurer of a corporation.

TERMINATION OF THE TRUST

As is stated in § 330 of the Restatement of Trusts, the settlor has power to revoke the trust if and to the extent that by the terms of the trust he reserved such a power. It is stated in Comment *i* that if the settlor reserves a power of revocation but does not specify any mode of revocation, the power can be exercised in any manner which sufficiently manifests his intent to revoke the trust. This section and comment were quoted and applied by the court in a Maryland case.[42] In that case it was held that where the trust instrument directed the trustee to dispose of the trust property in a certain manner "unless othewise directed," the instrument was ambiguous and extrinsic evidence was admissible to show that the settlor intended to reserve a power of revocation.

Where the continuance of the trust is not necessary to carry out a material purpose of the trust, if all the beneficiaries of the trust are competent and consent to its termination, they can compel the termination of the trust. It is so stated in § 337. That section was quoted in a case in New Hampshire[43] in which it was held that the widow and children of the testator, who were the only beneficiaries of the trust and who were all of full age, could compel a termination of the trust and the distribution of the trust property among them.

Even though the purposes of the trust have not been accomplished, the trust can be terminated with the consent of the settlor and of all the beneficiaries, or if the settlor is himself the sole beneficiary he can compel the termination of the trust. See Restatement of Trusts, §§ 338, 339. The court applied this rule in a recent case in Illinois.[44]

CHARITABLE TRUSTS

The rules applicable to charitable trusts are stated in Chapter 11 of the Restatement of Trusts. It is stated in § 375 that a trust is not a charitable trust if the persons who are to benefit are not of a sufficiently large or indefinite class so that the community is interested in the enforcement of the trust. In Comment *f* it is stated that a trust for the benefit of the widows and orphan children of ministers of a particular church is charitable. Such a trust tends to promote religion, and the class of beneficiaries is not so narrow as to make the purpose of the trust non-charitable. It was so held in a recent case in New York.[45]

It has been held occasionally that where a testator makes a direct bequest to an unincorporated charitable association, the bequest fails. A majority of the courts, however, hold that such a bequest can be upheld as a charitable trust, and if the association cannot take the title to the trust property, the court will appoint a trustee to hold the property for the benefit of the association. It is so stated in § 397, Comment *g*, of the Restatement of Trusts, and this comment was quoted and followed in a recent case in Kansas.[46]

RESULTING TRUSTS

The rules as to resulting trusts are stated in Chapter 12 of the Restatement of Trusts. A resulting trust arises where property is transferred upon an intended express trust which fails. See Restatement of Trusts, § 411. Where land is transferred in trust but the identity of the intended beneficiaries does not appear in the trust instrument, a resulting trust does not arise if the trustee is ready and willing to perform the intended trust. It is so stated in § 411, Comment *p*, which was quoted and applied by the Supreme Court of Pennsylvania in a recent decision.[47] Where, however, the trustee has died and it is impossible to determine the persons for whose benefit the trust was intended, the trust fails, of course, and a resulting trust arises. It was so held in a Kentucky case[48] in which a woman bequeathed property to her brother "to do with as we have privately agreed." The brother died intestate. It was held that a resulting trust arose in favor of the next of kin of the testatrix.

So also, a resulting trust arises where an express trust is fully performed without exhausting the trust estate. See Restatement of Trusts, § 430. Thus, in a recent case in Nebraska[49] it was held that where a testator left property for the support of his incompetent son, and it appeared that the testator did not intend that the son or his estate should have the principal of the trust fund, a resulting trust arose in favor of the estate of the testator on the death of the son.

A resulting trust also arises where property is transferred to one person and the purchase price is paid by another. In such a case the inference is that it was intended that the property should be held in trust for the person paying the purchase price, unless the transferee was a natural object of his bounty. Where the transferee is the wife or child or other natural object of bounty of the person paying the purchase price, the inference is that a gift and not a trust is intended. See Restatement of Trusts, § 442. There is an inference of a gift where the person who pays the consideration stands *in loco parentis* to the transferee, even though he is not related to him. It is so stated in § 442, Comment *a*, and this is followed in a recent case in New Jersey,[50] where a man married a woman who had a husband living, and he purchased land in the name of a child of the woman who was living in his household. The court held that the inference was that he intended to make a gift and not to create a trust.

Where a transfer of property is made to one person and the purchase price, or a part of the purchase price, is advanced by another as a loan to the transferee, no resulting trust arises. It is so stated in § 445 of the Restatement, and that section was relied upon by

(*Continued on page* 475)

41. Bank of Giles County v. Fidelity & Deposit Co., 84 F. (2d) 321 (C. C. A. 4th, 1936); Quanah A. & P. Ry. Co. v. Wichita State Bank & Trust Co., 93 S. W. (2d) 701 (Tex., 1936).
42. Lambdin v. Dantzebecker, 169 Md. 240, 181 Atl. 353 (1935).
43. Eastman v. First National Bank, 87 N. H. 189, 177 Atl. 414 (1935).
44. Vlahos v. Andrews, 362 Ill. 593, 1 N. E. (2d) 59 (1936).
45. Matter of Estate of Edge, 159 Misc. 505, 288 N. Y. Supp. 437 (1936).
46. Barnhart v. Bowers, 143 Kan. 866, 57 P. (2d) 60 1936).
47. Faunce v. McCorkle, 321 Pa. 116, 183 Atl. 926 (1936).
48. Arnold v. Clay, 262 Ky. 336, 90 S. W. (2d) 55 (1936).
49. *In re* Mooney's Estate, 267 N. W. 196 (Neb., 1936).
50. Mott v. Iossa, 119 N. J. Eq. 185, 181 Atl. 689 (1935).

REVIEW OF RECENT SUPREME COURT DECISIONS

Unemployment Compensation Provisions of Social Security Act Held Valid—Tax Properly an Excise within Power of Congress to Levy and Does not Violate Fifth Amendment—No Unconstitutional Interference with Reserved Powers of the States—Georgia Statute Forbidding Combined Resistance to Authority of State Furnishes No Sufficiently Ascertainable Standard of Guilt and under Proof Unreasonably Limits Right of Free Speech—Procedure Prescribed for Recovery of Taxes Imposed under Agricultural Adjustment Act Held not to Violate Due Process—Case Involving Assignment by Soviet Government to United States of All Claims Due Former from American Nationals—Payment to Philippine Islands of Processing Taxes on Cocoanut Oil Held Valid—Summary of Other Business

By Edgar Bronson Tolman

Social Security Act—Unemployment Compensation Provisions—Constitutional Validity

The provisions of Title IX of the Social Security Act, which impose an excise tax on certain classes of employers, and allow a credit of 90% thereof for unemployment compensation taxes paid by the employers under certain state laws, are valid.

The tax is properly an excise within the power of Congress to levy, and does not infringe the provisions of the Fifth Amendment.

The provisions allowing contributions to state unemployment funds to be credited on the federal tax, to the extent of 90% thereof, do not constitute an unconstitutional interference with the powers reserved to the states.

Steward Machine Co. v. Davis, 81 Adv. Op. 779; 57 Sup. Ct. Rep. 755.

In this opinion the Supreme Court, by a divided bench, sustained the constitutional validity of Title IX of the Social Security Act, pertaining to state unemployment compensation. The petitioner, an Alabama corporation, having paid the tax as required by the Social Security Act, demanded a refund and sued to recover payment of the amount of the tax. On a demurrer the District Court gave judgment for the defendant and dismissed the complaint. This ruling the Circuit Court of Appeals affirmed. On certiorari the judgment was affirmed in an opinion by Mr. Justice Cardozo.

The Social Security Act, enacted in 1935, is divided into eleven separate titles; of these only Titles IX and III received consideration in the opinion. Title IX imposes an excise tax on employers employing eight or more, but excludes agricultural labor, private domestic service and some other smaller classes. The tax is measured by stated percentages of the total wages paid by employers during the calendar year. For the year 1936 the tax is 1% of the total wages, for 1937, 2%, and thereafter 3%. The proceeds are paid into the Federal Treasury, but are not earmarked in any way. Credits are allowed, however, against the tax for all amounts paid to a state unemployment fund, up to 90% of the federal excise tax, if the Social Security Board certifies to the Secretary of the Treasury that the state law meets certain minimum requirements. The sums credited on account of state unemployment taxes are deposited with the Secretary of the Treasury in an Unemployment Trust Fund, and are to be invested in specified government securities, except such thereof as are needed to meet current withdrawals.

Title III is captioned "Grants to States for Unemployment Compensation Administration". Under it certain moneys are authorized to be appropriated to assist the states in administering their unemployment compensation laws, but no present appropriation is made. The appropriations are not specifically out of the proceeds of the employment tax, but out of *any* moneys in the treasury. This Title prescribes also the method by which the payments are to be made to the state, and also certain conditions to be established to the satisfaction of the Social Security Board, before certifying the propriety of the payment to the Secretary of the Treasury. They are intended to assure that the moneys granted by the federal government will be properly expended for unemployment relief.

The challenge to the statute was based on numerous grounds, and the objections are considered severally in the opinion of the Court. First considered was the contention that the tax is not an excise. This contention proceeded upon the theory that an excise is a tax upon a privilege, whereas employment is a right, so essential to the pursuit of happiness that it may not be burdened with an excise. To support the argument, resort was had both to history and the analysis of concepts. But, in the opinion of the Court, the contention was not sound on either basis.

So far as the historical argument was concerned, while it was recognized that many excises are generally associated with the enjoyment or use of property, other excises have been recognized historically. Among the latter was an excise in 1695, imposed by Parliament upon marriage, births, and burials to raise revenue to support the war against France. In 1777 Parliament imposed an annual "duty" of 21 shillings for "every male servant" engaged in certain forms of work. In 1780 certain taxes were imposed in Virginia for servants. These precedents were found sufficient to dispose of the historical argument against the tax.

Nor did the argument based upon principle fare better. This argument proceeded upon the theory that employment for lawful gain is a natural, inherent, or inalienable right, and not a privilege. The difficulty

*Assisted by James L. Homire.

found with this contention was that the power of the states to levy excise taxes has been frequently held to extend to activities pursued as of common right. No reason was found for imposing narrower limits upon the power of Congress to levy an excise than exists with respect to the power of the states to levy such a tax, except the constitutional requirement that it shall be uniform. With regard to this feature, MR. JUSTICE CARDOZO said:

"The subject matter of taxation open to the power of the Congress is as comprehensive as that open to the power of the states, though the method of apportionment may at times be different. 'The Congress shall have power to lay and collect taxes, duties, imposts and excises'. Art. 1, Section 8. If the tax is a direct one, it shall be apportioned according to the census or enumeration. If it is a duty, impost, or excise, it shall be uniform throughout the United States. Together, these classes include every form of tax appropriate to sovereignty."

Furthermore, the tax in question was found to conform to the requirement of uniformity, which is that the uniformity is geographical rather than intrinsic.

Next considered were objections to the tax based upon the Fifth Amendment, upon the ground that it is arbitrary by reason of the exemptions with respect to agricultural labor, private domestic service, and certain other classes. In dealing with this contention, the Court observed, first, that the Fifth Amendment contains no equal protection clause, so that the power of Congress is subject to less restraint than the power of the states. Since the classifications would be within the power of a state, *a fortiori,* they are within the power of Congress so far as the due process clause is concerned. This question was discussed in the opinion in part as follows:

"The classifications and exemptions directed by the statute now in controversy have support in considerations of policy and practical convenience that cannot be condemned as arbitrary. The classifications and exemptions would therefore be upheld if they had been adopted by a state and the provisions of the Fourteenth Amendment were invoked to annul them. This is held in two cases passed upon today in which precisely the same provisions were the subject of attack, the provisions being contained in the Unemployment Compensation Law of the State of Alabama. . . . The opinion rendered in those cases covers the ground fully. It would be useless to repeat the argument. The act of Congress is therefore valid, so far at least as its system of exemptions is concerned, and this though we assume that discrimination, if gross enough, is equivalent to confiscation and subject under the Fifth Amendment to challenge and annulment."

Next considered was perhaps the most important objection to the legislation, namely, the contention that it involves coercion of the states in violation of the Tenth Amendment, or of restrictions implicit in the federal system set up by the Constitution. In approaching this contention the operation of the statute was briefly described, including mention of the fact that the proceeds of the tax are paid into the federal treasury and are subject to appropriation generally. The petitioner contended particularly, however, that an ulterior aim is ingrained in the statute, and that the aim is essentially unlawful, especially because of the maximum 90% credit which is allowed to employers paying state unemployment taxes. In rejecting this contention, MR. JUSTICE CARDOZO pointed out that the attack upon the statute fails to meet two essential requirements. In elaboration of this the opinion states:

"There must be a showing in the first place that separated from the credit the revenue provisions are incapable of standing by themselves. There must be a showing in the second place that the tax and the credit in combination are weapons of coercion, destroying or impairing the autonomy of the states. The truth of each proposition being essential to the success of the assault, we pass for convenience to a consideration of the second, without pausing to inquire whether there has been a demonstration of the first."

Dealing with the latter contention first, the learned Justice called attention to the facts relating to unemployment which are now matters of common knowledge. The stupendous burden for public works and relief, $8,681,000,000 for the years 1934, 1935 and 1936, was cited, as well as the estimated extent of unemployment.

The necessity for dealing with these urgent problems and for cooperation between the nation and the states was then described as follows:

"In the presence of this urgent need for some remedial expedient, the question is to be answered whether the expedient adopted has overlept the bounds of power. The assailants of the statute say that its dominant end and aim is to drive the state legislatures under the whip of economic pressure into the enactment of unemployment compensation laws at the bidding of the central government. Supporters of the statute say that its operation is not constraint, but the creation of a larger freedom, the states and the nation joining in a cooperative endeavor to avert a common evil. . . .

"The Social Security Act is an attempt to find a method by which all these public agencies may work together to a common end. Every dollar of the new taxes will continue in all likelihood to be used and needed by the nation as long as states are unwilling, whether through timidity or for other motives, to do what can be done at home. At least the inference is permissible that Congress so believed, though retaining undiminished freedom to spend the money as it pleased. On the other hand fullfilment of the home duty will be lightened and encouraged by crediting the taxpayer upon his account with the Treasury of the nation to the extent that his contributions under the laws of the locality have simplified or diminished the problem of relief and the probable demand upon the resources of the fisc. Duplicated taxes, or burdens that approach them, are recognized hardships that government, state or national, may properly avoid. . . If Congress believed that the general welfare would better be promoted by relief through local units than by the system then in vogue, the cooperating localities ought not in all fairness to pay a second time.

"Who then is coerced through the operation of this statute? Not the taxpayer. He pays in fulfilment of the mandate of the local legislature. Not the state. Even now she does not offer a suggestion that in passing the unempayment law she was affected by duress. . . For all that appears she is satisfied with her choice, and would be sorely disappointed if it were now to be annulled. The difficulty with the petitioner's contention is that it confuses motive with coercion. 'Every tax is in some measure regulatory. To some extent it interposes an economic impediment to the activity taxed as compared with others not taxed.' . . . In like manner every rebate from a tax when conditioned upon conduct is in some measure a temptation. But to hold that motive or temptation is equivalent to coercion is to plunge the law in endless difficulties. The outcome of such a doctrine is the acceptance of a philosophical determinism by which choice becomes impossible. Till now the law has been guided by a robust common sense which assumes the freedom of the will as a working hypothesis in the solution of its problems. The wisdom of the hypothesis has illustration in this case. Nothing in the case suggests the exertion of a power akin to undue influence, if we assume that such a concept can ever be applied with fitness to the relations between state and nation. Even on that assumption the location of the point at which pressure turns into compulsion, and ceases to be inducement, would be a question of degree,—at times, perhaps, of fact. The point had not been reached when Alabama made her choice. We

cannot say that she was acting, not of her unfettered will, but under the strain of a persuasion equivalent to undue influence, when she chose to have relief administered under laws of her own making, by agents of her own selection, instead of under federal laws, administered by federal officers, with all the ensuing evils, at least to many minds, of federal patronage and power. There would be a strange irony, indeed, if her choice were now to be annulled on the basis of an assumed duress in the enactment of a statute which her courts have accepted as a true expression of her will. . . We think the choice must stand."

As an analogy in support of the credit device, the opinion cites the credit allowed on the federal tax on the transfer of a decedent's estate, up to 80% on state inheritance taxes.

The petitioner relied upon *United States* v. *Butler*, which held invalid the processing taxes imposed by the Agricultural Adjustment Act. That case was distinguished, however, on several grounds, among them that the proceeds of the tax here are not earmarked for any special group; that the unemployment compensation law, which is a condition of the credit, necessarily has the approval of the state; that the condition is not linked with an irrevocable agreement, since the state may repeal its unemployment law and terminate the credit; and that the condition is not designed to attain any unlawful end.

The objection to Title IX finally considered was that the statute calls for a surrender by the states of powers essential to their quasi-sovereign existence. Support for the contention was sought by the petitioner in Section 903, which defines the minimum criteria to which a state compensation system must conform to be accepted as a basis for a credit, and Section 904, prescribing complementary rights and duties.

The fallacy of this contention was thought to lie chiefly in failure to give adequate weight to the necessity that there be some assurance that the state law on which the credit is based shall be in reality what it purports to be, and also in failure to recognize that the states are free to repeal or change their laws and withdraw the funds, with consequent termination of the credit. The necessity that there shall be assurance that the state legislation in reality provides unemployment compensation, and at the same time that adequate power and discretion shall be left in the states, was elaborated as follows:

"A credit to taxpayers for payments made to a State under a state unemployment law will be manifestly futile in the absence of some assurance that the law leading to the credit is in truth what it professes to be. An unemployment law framed in such a way that the unemployed who look to it will be deprived of reasonable protection is one in name and nothing more. What is basic and essential may be assured by suitable conditions. The terms embodied in these sections are directed to that end. A wide range of judgment is given to the several states as to the particular type of statute to be spread upon their books."

The unfettered power of the states to withdraw their funds and to terminate the pertinent legislation was also emphasized in answer to the contention that there has been a surrender of state sovereignty. Various aspects of the system were discussed relative to this:

"We are to keep in mind steadily that the conditions to be approved by the Board as the basis for a credit are not provisions of a contract, but terms of a statute, which may be altered or repealed. Section 903 (a) (6). The state does not bind itself to keep the law in force. It does not even bind itself that the moneys paid into the federal fund will be kept there indefinitely or for any stated time. On the contrary, the Secretary of the Treasury will honor a requisition for the whole or any part of the deposit in the fund whenever one is made by the appropriate officials. The only consequence of the repeal or excessive amendment of the statute, or the expenditure of the money, when requisitioned, for other than compensation uses or administrative expenses, is that approval of the law will end, and with it the allowance of a credit, upon notice to the state agency and an opportunity for hearing. Section 903 (b) (c).

"These basic considerations are in truth a solvent of the problem. Subjected to their test, the several objections on the score of abdication are found to be unreal.

"Thus, the argument is made that by force of an agreement the moneys when withdrawn must be 'paid through public employment offices in the State or through such other agencies as the Board may approve.' Section 903 (a) (1). But in truth there is no agreement as to the method of disbursement. There is only a condition which the state is free at pleasure to disregard or to fulfill. Moreover, approval is not requisite if public employment offices are made the disbursing instruments. Approval is to be a check upon resort to 'other agencies' that may, perchance, be irresponsible. A state looking for a credit must give assurance that her system has been organized upon a base of rationality."

Stress was placed by the petitioner particularly on the provision that the Secretary of the Treasury is authorized to secure and hold the proceeds of the state tax in the Unemployment Trust Fund and invest the same in obligations of the United States. But no surrender of essential state power was found in this, for reasons thus stated:

"The same pervasive misconception is in evidence again. All that the state has done is to say in effect through the enactment of a statute that her agents shall be authorized to deposit the unemployment tax receipts in the Treasury at Washington. Alabama Unemployment Act of September 14, 1935, section 10 (i). The statute may be repealed. Section 903 (a) (6). The consent may be revoked. The deposits may be withdrawn. The moment the state commission gives notice to the depositary that it would like the moneys back, the treasurer will return them. To find state destruction there is to find it almost anywhere. With nearly as much reason one might say that a state abdicates its functions when it places the state moneys on deposit in a national bank." . .

"The inference of abdication thus dissolves in thinnest air when the deposit is conceived of as dependent upon a statutory consent, and not upon a contract effective to create a duty. By this we do not intimate that the conclusion would be different if a contract were discovered. Even sovereigns may contract without derogating from their sovereignty. . . The states are at liberty, upon obtaining the consent of Congress, to make agreements with one another. . . We find no room for doubt that they may do the like with Congress if the essence of their statehood is maintained without impairment. Alabama is seeking and obtaining a credit of many millions in favor of her citizens out of the Treasury of the nation. Nowhere in our scheme of government—in the limitations express or implied of our federal constitution—do we find that she is prohibited from assenting to conditions that will assure a fair and just requital for benefits received. But we will not labor the point further. An unreal prohibition directed to an unreal agreement will not vitiate an act of Congress, and cause it to collapse in ruin."

In conclusion, it was pointed out that the validity of Title III was not at issue, and that Title IX can operate whether Title III is in force or not.

MR. JUSTICE MCREYNOLDS delivered a separate opinion in which he expressed the view that the legislation exceeds the power granted to Congress and interferes with the orderly government of the states. In support of this view he cited *Texas* v. *White*, 7 Wall. 700, and a message of President Pierce transmitted to the Senate May 3, 1854, in which the President had

stated his reasons for vetoing a bill providing for a grant of 10,000,000 acres to the states for the maintenance of the indigent insane within the several states. In his message, President Pierce expressed the opinion that there was no constitutional authority "for making the Federal Government the great almoner of public charity throughout the United States." The extended message quoted in the opinion stated further that to make the Federal Government the almoner of public charity "would, in my judgment, be contrary to the letter and spirit of the Constitution and subversive of the whole theory upon which the Union of these States is founded. And if it were admissible to contemplate the exercise of this power for any object whatever, I can not avoid the belief that it would in the end be prejudicial rather than beneficial in the noble offices of charity to have the charge of them transferred from the States to the Federal Government."

In concluding his opinion as to the validity of the statute MR. JUSTICE MCREYNOLDS said:

"No defense is offered for the legislation under review upon the basis of emergency. The hypothesis is that hereafter it will continuously benefit unemployed members of a class. Forever, so far as we can see, the States are expected to function under federal direction concerning an internal matter. By the sanction of this adventure, the door is open for progressive inauguration of others of like kind under which it can hardly be expected that the States will retain genuine independence of action. And without independent States a Federal Union as contemplated by the Constitution becomes impossible.

"At the bar counsel asserted that under the present Act the tax upon residents of Alabama during the first year will total $9,000,000. All would remain in the Federal Treasury but for the adoption by the State of measures agreeable to the National Board. If continued, these will bring relief from the payment of $8,000,000 to the United States.

"Ordinarily, I must think, a denial that the challenged action of Congress and what has been done under it amount to coercion and impair freedom of government by the people of the State would be regarded as contrary to practical experience. Unquestionably our federate plan of government confronts an enlarged peril."

MR. JUSTICE SUTHERLAND also delivered a separate opinion in which he stated that, while he concurred with most of the prevailing opinion, he had difficulty with the question whether the administrative provisions of Title IX invade the administrative powers reserved to the states under the Tenth Amendment. Although recognizing that the states and the nation may cooperate to a common end, which each is authorized to reach (as for example, old-age assistance covered by the provisions of Title I of the Social Security Act), he was of the opinion that Title IX contemplates an unconstitutional surrender by the states of essential governmental powers. Distinguishing the case from the old age assistance provisions, he said:

"An illustration of what I regard as permissible cooperation is to be found in Title I of the act now under consideration. By that title, federal appropriations for old-age assistance are authorized to be made to any state which shall have adopted a plan for old-age assistance conforming to designated requirements. But the state is not obliged, as a condition of having the federal bounty, to deposit in the federal treasury funds raised by the state. The state keeps its own funds and administers its own law in respect of them, without let or hindrance of any kind on the part of the federal government; so that we have simply the familiar case of federal aid upon conditions which the state, without surrendering any of its powers, may accept or not as it chooses. . .

"But this is not the situation with which we are called upon to deal in the present case. For here, the state *must* deposit the proceeds of its taxation in the federal treasury, upon terms which make the deposit suspiciously like a forced loan to be repaid only in accordance with restrictions imposed by federal law. Title IX, sections 903 (a) (3), 904 (a), (b), (e). All moneys withdrawn from this fund must be used exclusively for the payment of compensation. Section 903 (a) (4). And this compensation is to be paid through public employment offices in the state or such other agencies as a *federal board may approve*. Section 903 (a) (1). The act, it is true, recognizes [section 903 (a) (6)] the power of the legislature to amend or repeal its compensation law at any time. But there is nothing in the act, as I read it, which justifies the conclusion that the state may, in that event, unconditionally withdraw its funds from the federal treasury. Section 903 (b) provides that the board shall certify in each taxable year to the Secretary of the Treasury each state whose law has been approved. But the board is forbidden to certify any state which the board finds has so changed its law that it no longer contains the provisions specified in subsection (a), 'or has with respect to such taxable year failed to comply substantially with any such provision.' The federal government, therefore, in the person of its agent, the board, sits not only as a perpetual overseer, interpreter and censor of state legislation on the subject, but, as lord paramount, to determine whether the state is faithfully executing its own law—as though the state were a dependency under pupilage and not to be trusted. The foregoing, taken in connection with the provisions that money withdrawn can be used only in payment of compensation and that it must be paid through an agency approved by the federal board, leaves it, to say the least, highly uncertain whether the right of the state to withdraw any part of its own funds exists, under the act, otherwise than upon these various statutory conditions. It is true also that subsection (f) of section 904 authorizes the Secretary of the Treasury to pay to any state agency 'such amount as it may duly requisition, not exceeding the amount standing to the account of such State agency at the time of such payment.' But it is to be observed that the payment is to be made to the state *agency* and only such amount as that agency may *duly* requisition. It is hard to find in this provision any extension of the right of the state to withdraw its funds except in the manner and for the specific purpose prescribed by the act."

MR. JUSTICE BUTLER, in a dissenting opinion, expressed his concurrence with the objections stated by MR. JUSTICE MCREYNOLDS and MR. JUSTICE SUTHERLAND. In addition, he urged also that the "tax and credit" device employed by the provisions in questions vitiates the statute, since it may be made effective to enable the federal authorities to induce or compel state enactments for any purpose within the realm of state power and generally to control the administration of state laws. After referring to the fact that the Constitution confers no power on the United States to pay unemployed persons, or to require the State to do so, but observing that federal agencies prepared and took draft bills to various state legislatures for passage, in form to meet the federal requirements, and in order to obtain relief for employers from the impending federal tax, he added:

"The terms of the measure make it clear that the tax and credit device was intended to enable federal officers virtually to control the exertion of powers of the States in a field in which they alone have jurisdiction and from which the United States is by the Constitution excluded."

MR. JUSTICE VAN DEVANTER concurred in the opinion of MR. JUSTICE SUTHERLAND.

The case was argued by Messrs. Charles E. Wyzanski and Assistant Attorney General Jackson for the petitioner and by Messrs. William Logan Martin and Neil P. Sterne for the respondent.

Criminal Law—Habeas Corpus—State Statutes

The Georgia statute forbidding combined resistance to the authority of the State furnishes no sufficiently ascertainable standard of guilt, as construed, and under the proof it unreasonably limits the right of free speech, contrary to the guarantees of the Fourteenth Amendment.

Herndon v. Lowry, 81 Adv. Op. 623; 57 Sup. Ct. Rep. 732.

In this case the Court considered a challenge to the constitutional validity of certain provisions of the Penal Code of Georgia, as applied in the circumstances present. Appellant, Herndon, was convicted in the Superior Court of Fulton County, Georgia, on an indictment charging an attempt to induce others to join in combined resistance to the lawful authority of the State by open force, violent means, and unlawful acts, alleging that insurrection was intended to be manifested and accomplished thereby. A sentence was imposed of imprisonment from 18 to 20 years. The Supreme Court of Georgia affirmed the judgment and an appeal to the United States Supreme Court was thereafter dismissed for want of jurisdiction.

Thereafter the appellant instituted a habeas corpus proceeding in a state court in Georgia. In this proceeding the state court construed and disposed of contentions based on the Federal Constitution so that the constitutional questions were open on appeal to the United States Supreme Court. As to the effect of the habeas corpus proceeding, the latter Court said:

> The scope of a *habeas corpus* proceeding in the circumstances disclosed is a state and not a federal question and since the state courts treated the proceeding as properly raising issues of federal constitutional right, we have jurisdiction and all such issues are open here. We must, then, inquire whether the statute as applied in the trial denied appellant rights safeguarded by the Fourteenth Amendment."

In the habeas corpus proceeding the trial court, on a record which included the evidence taken at the original trial, overruled a motion to strike, a special demurrer, and an objection to an admission of the trial court record, and decided that the statute did not, as applied, infringe appellant's freedom of speech and assembly. It concluded, however, that there was a violation of the Fourteenth Amendment, because there was no sufficiently ascertainable standard of guilt prescribed. This ruling the Supreme Court of Georgia reversed.

The specific charge against appellant was based on Section 56 of the State Penal Code, which provides that:

> "56. Any attempt, by persuasion or otherwise, to induce others to join in any combined resistance to the lawful authority of the State shall constitute an attempt to incite insurrection."

Section 55 defines insurrection as "any combined resistance to the lawful authority of the State, with intent to the denial thereof, when the same is manifested or intended to be manifested by acts of violence." Section 57 prescribes a death penalty for insurrection or attempt to incite insurrection, but with penitentiary sentence if the jury recommends mercy. Section 58 prescribes a penitentiary term for circulating any paper for the purpose of inciting insurrection, riot, conspiracy, or resistance against lawful authority of the State.

On appeal to the Supreme Court the judgment of the Supreme Court of Georgia was reversed by a divided bench. The prevailing opinion was delivered by MR. JUSTICE ROBERTS. The opinion contains a review of the evidence from which it appears that the critical evidence against appellant consisted of receipt books showing receipts of small sums of money, and certificates showing contributions to the Communist Party's Presidential Election Campaign Fund, and printed matter, magazines, pamphlets and copies of communist newspapers, found in appellant's possession. It further appeared that appellant had joined the Communist Party in Kentucky and had been sent as a paid organizer into Georgia. There appeared to be no evidence that appellant advocated the views expressed in these documents. Two circulars which appellant had distributed had nothing to do with the Communist Party but were concerned with unemployment relief.

The evidence also included exhibits from some of the papers found in appellant's possession. The membership blanks specify six items for which members are to vote. None of these was criminal on its face. But one item was claimed to be criminal by reason of extrinsic facts. This read "Equal rights for Negroes and self-determination for the Black Belt." In support of the conviction, it was urged by the State that criminality is to be found in various booklets and literature found in the possession of appellant from which it appeared that the Communist Party was endeavoring to win sympathy from the negro population, by advocating an agrarian revolution, the right of self-determination by the negro population, the establishment of a single governmental unit where the majority of the population shall consist of negroes, and advocating mass actions, such as demonstrations, strikes and tax boycotts.

There was no evidence that appellant had distributed any of the printed matter in question other than that regarding unemployment, or that he advocated forcible subversion of governmental authority. There was evidence he had held meetings to recruit members for the party and had solicited contributions for its support, and there was also evidence as to the doctrines which the Communist Party espouses.

In view of the evidence, the Court concluded that the intent to incite insurrection, if found, must rest on appellant's procuring members for the party and his possession of the described literature when he was arrested. In reaching a decision, Mr. Justice Roberts pointed out that appellant was not indicted under Section 55, but that the State Supreme Court had evidently imported from Section 55 the additional element, namely, "manifested or intended to be manifested by acts of violence," into Section 56 under which the indictment was found.

The trial court had instructed the jury that, in order to convict, it must appear that "immediate serious violence against the State of Georgia was to be expected or advocated." The State Supreme Court expressed the view that it would not be necessary to guilt that an insurrection should follow instantly or at any given time, but it would be sufficient that he intended it should happen at any time as a result of his influence.

On rehearing the State Supreme Court elaborated this by adding that the intent that an insurrection should follow was sufficiently shown if the defendant intended that an insurrection should happen "at any time within which he might reasonably expect his influence to be directly operative."

In reversing the judgment, the Supreme Court concluded that the statute as construed and applied provides no reasonably ascertainable standard of guilt and, consequently, violates the guarantee of liberty con-

tained in the Fourteenth Amendment. In arriving at this conclusion the Court recognized the power of the state and federal governments to make criminal, inciting or attempting to incite insubordination in the military and naval forces, or the obstruction of enlistment. Referring to rulings confirming such right MR. JUSTICE ROBERTS said:

"We sustained the power of the government or a state to protect the war operations of the United States by punishing intentional interference with them. We recognized, however, that words may be spoken or written for various purposes and that wilful and intentional interference with the described operations of the government might be inferred from the time, place, and circumstances of the act. 'The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree.'

"The legislation under review differs radically from the Espionage Acts in that it does not deal with a wilful attempt to obstruct a described and defined activity of the government.

"The State, on the other hand, insists that our decisions uphold state statutes making criminal utterances which have a 'dangrous tendency' towards the subversion of government. It relies particularly upon *Gitlow* v. *New York*, 268 U. S. 652. There, however, we dealt with a statute which, quite unlike Section 56 of the Georgia Criminal Code, denounced as criminal certain acts carefully and adequately described."

However, the power to abridge freedom of speech and assembly was emphasized as the exception rather than the rule. In this connection, the Court added:

"The power of a state to abridge freedom of speech and of assembly is the exception rather than the rule and the penalizing even of utterances of a defined character must find its justification in a reasonable apprehension of danger to organized government. The judgment of the legislature is not unfettered. The limitation upon individual liberty must have appropriate relation to the safety of the state. Legislation which goes beyond this need violates the principle of the Constitution. If, therefore, a state statute penalize innocent participation in a meeting held with an innocent purpose merely because the meeting was held under the auspices of an organization membership in which, or the advocacy of whose principles, is also denounced as criminal, the law, so construed and applied, goes beyond the power to restrict abuses of freedom of speech and arbitrarily denies that freedom. And, where a statute is so vague and uncertain as to make criminal an utterance or an act which may be innocently said or done with no intent to induce resort to violence or on the other hand may be said or done with a purpose violently to subvert government, a conviction under such a law cannot be sustained. Upon this view we held bad a statute of California providing that 'Any person who displays a red flag, . . in any public place or in any meeting place or public assembly, or from or on any house, building or window as a sign, symbol or emblem of opposition to organized government . . . is guilty of a felony.'

"After pointing out that peaceful agitation for a change of our form of government is within the guaranteed liberty of speech, we said of the act in question: 'A statute which upon its face, and as authoritatively construed, is so vague and indefinite as to permit the punishment of the fair use of this opportunity is repugnant to the guaranty of liberty contained in the Fourteenth Amendment.' "

The opinion then states that appellant had a constitutional right to address meetings and organize parties unless his action violated some provision of a valid statute, that he was only charged with violating Section 56, which forbids the inciting or attempt to incite to insurrection by violence, and that the requisite proof was lacking. In view of the evidence it was concluded that to make membership in the Communist Party and solicitation of members a criminal offense punishable by death, in the discretion of the jury, was an unwarranted invasion of the right of freedom of speech.

On the point that the statute failed to furnish a reasonably ascertainable standard of guilt, MR. JUSTICE ROBERTS said:

"The test of guilt is thus formulated by the Supreme Court of the state. Forcible action must have been contemplated but it would be sufficient to sustain a conviction if the accused intended that an insurrection 'should happen at any time within which he might reasonably expect his influence to continue to be directly operative in causing such action by those whom he sought to induce.' If the jury conclude that the defendant should have contemplated that any act or utterance of his in opposition to the established order or advocating a change in that order, might, in the distant future, eventuate in a combination to offer forcible resistance to the State, or as the State says, if the jury believe he should have known that his words would have 'a dangerous tendency' then he may be convicted. To be guilty under the law, as construed, a defendant need not advocate resort to force. He need not teach any particular doctrine to come within its purview. Indeed, he need not be active in the formation of a combination or group if he agitate for a change in the frame of government, however peaceful his own intent. If, by the exercise of prophesy, he can forecast that, as a result of a chain of causation, following his proposed action a group may arise at some future date which will resort to force, he is bound to make the prophesy and abstain, under pain of punishment, possibly of execution. Every person who attacks existing conditions, who agitates for a change in the form of government, must take the risk that if a jury should be of opinion that he ought to have foreseen that his utterances might contribute in any measure to some future forcible resistance to the existing government he may be convicted of the offense of inciting insurrection. Proof that the accused in fact believed that his effort would cause a violent assault upon the state would not be necessary to conviction. It would be sufficient if the jury thought he reasonably might foretell that those he persuaded to join the party might, at some time in the indefinite future, resort to forcible resistance of government. The question thus proposed to a jury involves pure speculation as to future trends of thought and action. Within what time might one reasonably expect that an attempted organization of the Communist Party in the United States would result in violent action by that party? If a jury returned a special verdict saying twenty years or even fifty years the verdict could not be shown to be wrong. The law, as thus construed, licenses the jury to create its own standard in each case."

MR. JUSTICE VAN DEVANTER delivered a dissenting opinion in which MR. JUSTICE MCREYNOLDS, MR. JUSTICE SUTHERLAND and MR. JUSTICE BUTLER joined. In the dissenting opinion MR. JUSTICE VAN DEVANTER said:

"I am of opinion that the Georgia statute, as construed and applied by the supreme court of the State in Herndon's case, prescribes a reasonably definite and ascertainable standard by which to determine the guilt or innocence of the accused, and does not encroach on his right of freedom of speech or assembly.

"It plainly appears, I think, that the offense defined in the statute, and of which Herndon was convicted, was not that of advocating a change in the state government by lawful means, such as an orderly exertion of the elective franchise or of the power to amend the state constitution, but was that of attempting to induce and incite others to join in combined *forcible* resistance to the lawful authority of the State."

A review of Sections 55, 56 and 57 of the Penal Code and of the State Court's construction thereof then followed, from which it was argued that an intent to

resort to force or violence was an essential element of the combined resistance referred to in Section 56. After reference to the opinion of the State Supreme Court, MR. JUSTICE VAN DEVANTER said:

"It thus is made quite plain that the case proceeded from beginning to end, and in both state courts, upon the theory that the offense denounced by the statute and charged in the indictment was that of attempting to induce and incite others to join in combined *forcible* resistance to the lawful authority of the State; that the jury returned a verdict of guilty upon that theory; and that it was upon the same theory that the supreme court held the jury's verdict was supported by the evidence, and affirmed the conviction.

"The present appeal is not from that judgment of affirmance but from a judgment denying a subsequent petition for habeas corpus.

"If it be assumed that on this appeal the evidence produced on the trial in the criminal case may be examined to ascertain how the statute was applied, I am of opinion, after such an examination, that the statute was applied as if the words 'combined resistance' therein were in letter and meaning 'combined forcible resistance'."

The dissenting opinion also sets forth a summary of the evidence, comprised of the literature seized and also evidence from which it might be inferred indirectly that Herndon had distributed such literature. The record was thus thought to show that the State Supreme Court had considered the statute as making criminal an attempt to induce and incite others to join in combined forcible resistance to the lawful authority of the state. In this connection MR. JUSTICE VAN DEVANTER said:

"The purpose and probable effect of such literature, when under consideration in a prosecution like that against Herndon, are to be tested and determined with appropriate regard to the capacity and circumstances of those who are sought to be influenced. In this instance the literature is largely directed to a people whose past and present circumstances would lead them to give unusual credence to its inflaming and inciting features.

"And so it is that examination and consideration of the evidence convince me that the supreme court of the State applied the statute, conformably to its opinion, as making criminal an attempt to induce and incite others to join in combined *forcible* resistance to the lawful authority of the State."

In conclusion, the view was expressed that the statute as construed is not defective for failure to prescribe a sufficiently ascertainable standard of guilt. As to this the dissenting opinion points out that the State Court, on the rehearing, had limited its earlier pronouncement on the subject and had concluded that it was not sufficient that the intent of combined forcible resistance should happen *at any time*. Its later opinion was rather that it was sufficient if it was shown that there was intent to produce combined forcible resistance at any time within which the defendant might reasonably expect his influence to be directly operative in causing such action by those whom he sought to induce. Concluding his opinion with a discussion of this, MR. JUSTICE VAN DEVANTER said:

"I do not perceive that this puts the standard of guilt at large or renders it inadmissibly vague. The accused must intend that combined *forcible* resistance shall proximately result from his act of inducement. There is no uncertainty in that. The intended point of time must be within the period during which he 'might reasonably expect' his inducement to remain *directly* operative in causing the combined forcible resistance. The words 'might reasonably expect' have as much precision as is admissible in such a matter, are not difficult to understand, and conform to decisions heretofore given by this Court in respect of related questions. I therefore am of opinion that there is no objectionable uncertainty about the standard of guilt and that the statute does not in that regard infringe the constitutional guaranty of due process of law.

"Believing that the statute under which the conviction was had is not subject to the objections leveled against it, I think the judgment of the supreme court of the State denying the petition for habeas corpus should be affirmed."

The case was argued by Mr. Whitney North Seymour for the appellant, and by Mr. J. Walter Le Craw for the appellee.

Taxation—Processing Taxes—Procedure Governing Refunds

The provisions of Title VII of the Revenue Act of 1936, prescribing procedure for the recovery of taxes imposed under the Agricultural Adjustment Act of 1933 are not obnoxious to the due process clause of the Fifth Amendment.

Anniston Manufacturing Co. v. Davis, 81 Adv. Op. 722; 57 Sup. Ct. Rep. 493.

In this case the Court considered certain questions relating to the constitutional validity of provisions of the Revenue Act of 1936, regulating procedure for the recovery of taxes imposed under the Agricultural Adjustment Act of 1933, both of floor stock and processing taxes. The provisions governing the procedure are embraced in Title VII, Sections 901-917, of the Revenue Act of 1936. They prescribe the conditions on which refunds shall be made, periods of limitation, and jurisdiction of the District Courts concurrent with the Court of Claims, for recovery of floor stock and compensating taxes. As to processing taxes, an administrative procedure is prescribed, including the enactment of certain rules of evidence or presumptions which must be observed. Section 910 undertakes to free collectors from liability for moneys collected by them, and paid into the Treasury.

The petitioner had instituted suit in November, 1935, to recover amounts paid as processing taxes and as floor stock taxes. Upon the enactment of the new provisions in 1936, the petitioner amended its complaint asserting the unconstitutionality of the new provisions, contending that it had a vested right of action against the Collector, which could not be destroyed without violation of the Fifth Amendment; that the Collector was personally liable, and that Section 910 was invalid in its attempt to destroy that liability.

The District Court and Circuit Court of Appeals ruled that the District Court had no jurisdiction to entertain the suit. On certiorari, a judgment of dismissal was affirmed by the Supreme Court, in an opinion by the CHIEF JUSTICE, but upon the grounds stated in the opinion.

It may be observed first that no serious question was raised as to the recovery of floor taxes, since the remedy of suit in court against the United States was preserved. Moreover, as to the processing taxes, the Court sustained the Government's contention that no ruling is required as to whether Congress may withdraw *all* remedy, both against the Collector and against the Government, since the new provisions do preserve a remedy to enforce any existing liability.

Consequently, attention was given chiefly to a consideration of *adequacy* of the remedy afforded under the new procedure. In dealing with this, the Court pointed out that a claim for refund may be filed with the Commissioner, and that review of his ruling may be had with a hearing before a Board of Review es-

tablished in the Treasury Department, at which the claimant may be represented by counsel, subpoena witnesses, introduce evidence and examine and cross-examine witnesses. Decision is required of the Board within six months, with findings of fact and a decision in writing, copies of which must be mailed to the claimant and the Commissioner. Judicial review of the Board's decision by the Circuit Court of Appeals is then provided for, based on a transcript of the record on which the Board's decision is made. Under certain circumstances, additional evidence may be taken by the Circuit Court of Appeals. Final review is allowed by certiorari in the United States Supreme Court.

After describing the administrative procedure in detail, Mr. CHIEF JUSTICE HUGHES expressed the view that adequate judicial review was preserved, saying:

"We think that this plan of procedure provides for the judicial determination of every question of law which the claimant is entitled to raise. We find nothing in the statute which limits the judicial review to questions of statutory construction or of mere regularity of procedure. The 'law,' with which the decision of the Board may be in conflict, may be the fundamental law. Questions of validity as well as of statutory authority or regularity may be determined. These may relate to due process in the hearing or in the refusal of a refund. The Government does not contest this construction but on the contrary affirms it. The Government recognizes and urges that the jurisdiction given to the Court of Appeals 'to modify or reverse' the decision of the Board 'if it is not in accordance with law' includes the power to review all questions of general and statutory law and all constitutional questions. Thus every constitutional right which the petitioner here is entitled to invoke with respect to the refund of the taxes which it has paid may be heard and determined by the Court of Appeals and ultimately by this Court upon a review of a decision reached in the course of the prescribed administrative procedure. The Government urges, and we think correctly, that if on such a review any part of Title VII were held to be invalid, 'the tax-payer may recover all of the taxes to which he is entitled under such a decision.' Upon the judicial review of the action of the Board, the Court of Appeals and this Court would have power 'to direct the Board to enter any designated judgment' and the Commissioner is required to make refund of any amount which may thus be determined to be due the claimant."

Attention was then turned to questions concerning the validity of provisions specifically attacked. These related chiefly to the burden of proof and certain presumptions.

The new provision, Section 902, provides that no refund shall be allowed unless it is established that the claimant bore the burden of the tax and "has not been relieved thereof nor reimbursed therefor nor shifted such burden, directly or indirectly" through inclusion thereof in the price of the product, through reduction in the price paid for raw material, or in any manner whatever.

In the case under review, the allegation was that the petitioner had initially paid the tax, to which there was a demurrer. The question was, accordingly, whether the burden of the tax had been shifted. In this connection the Court observed that it could not sustain the petitioner's demand for a refund irrespective of whether the burden of the tax had been shifted. As to this the opinion states:

"The question for administrative determination is whether the burden of that payment has been shifted. So far as petitioner's contention may be taken to be that it is entitled to recover by reason of the invalidity of the tax, although in fact its burden has been 'passed on' to another, the contention cannot be sustained. While the taxpayer was undoubtedly hurt when he paid the tax, if he has obtained relief through the shifting of its burden, he is no longer in a position to claim an actual injury and the refusal of a refund in such a case cannot be regarded as a denial of constitutional right."

Further, the Court pointed out that failure to provide a remedy for those to whom the tax has been shifted constitutes no basis for complaint by the petitioner here. With respect to this the Court said:

"The circumstance that under Title VII, here involved, there is no provision for making a refund to particular persons, to whom the burden of the invalid exaction may be found to have been shifted, presents no sound distinction so far as the claimant is concerned. The controlling principle is that there is no denial of constitutional right in requiring the claimant to show, where it can be shown, that he alone has borne the burden of the invalid tax and has not shifted it to others."

Next considered was the contention that Section 902 imposes an impossible burden, by setting up a condition to recovery which the petitioner cannot possibly meet. In this aspect, the petitioner contended that it was in a class which cannot meet the burden of proof, and consequently is wrongfully barred from all recovery. But the Court thought this a statement of legal conclusion, at best, which should be determined only after a consideration of all pertinent facts. As to this the Court expressed the view that the Act should not be construed to deny a refund in any case where the claimant is constitutionally entitled to recover, and said:

"Despite the broad language of Section 902, we do not think that it should be construed as intended to deny a refund in any case where a claimant is constitutionally entitled to it. We apply the familiar canon which makes it our duty, of two possible constructions, to adopt the one which will save and not destroy. We cannot attribute to Congress an intent to defy the Fifth Amendment or 'even to come so near to doing so as to raise a serious question of constitutional law'. . . When the Congress requires the claimant, who has paid the invalid tax, to show that he has not been reimbursed or has not shifted its burden, the provision should not be construed as demanding the performance of a task, if ultimately found to be inherently impossible, as a condition of relief to which the claimant would otherwise be entitled. There is ample room for the play of the statute within the range of possible determinations. Impossibility of proof may not be assumed. It cannot be doubted that the requirement has appropriate and valid effect in placing upon the claimant the duty to present fully all the facts pertaining to the question of the shifting of the burden of the tax and in denying relief where the facts justify a conclusion that the burden has been shifted from the claimant to others. When the facts have been shown it becomes the duty of the Board of Review to make its determination according to the legal rights of the claimant. . .

"In saying this, we are not passing upon the constitutional right of petitioner to a refund or upon the question whether in its case the shifting of the burden of the tax is or is not 'susceptible of proof.' Constitutional questions are not to be decided hypothetically. When particular facts control the decision they must be shown.

". . . Petitioner's contention as to impossibility of proof is premature. Manifestly there is no impossibility so far as the production of proof of petitioner's operations or course of business is concerned. What is meant by impossibility of proof is impossibility of determination after these facts are in. Whether or not any such impossibility of determination will exist is a question which properly should await the ascertainment of the facts. For the present purpose it is sufficient to hold, and we do hold, that the petitioner may constitutionally be required to present all the pertinent facts in the prescribed admin-

istrative proceeding and may there raise, and ultimately may present for judicial review, any legal question which may arise as the facts are developed."

The validity of the presumptions created by Section 907 was next considered. That section provides as to processing taxes, that it shall be *prima facie* evidence that the burden of the tax was borne by the claimant to the extent that the average margin per unit of the commodity processed was lower during the tax period than the average margin was during the period before and after the tax. The "tax period" is defined as the period in which the claimant actually paid the tax and ends with the last payment; and the "period before and after the tax" is defined as the 24 months (except that in the case of tobacco it is 12) immediately preceding the effective date of the processing tax and the 6 months, February to July, 1936.

The contention that these presumptions are unconstitutional, because arbitrary, was rejected in the following language;

". . . But it cannot be said that the comparisons set up between the results of operations during the 'tax period' and the 'period before and after the tax' are wholly irrelevant. Nor can it now be determined what will be the effect of the presumptions. While petitioner assails them, its complaint contains no allegation as to their actual effect in relation to petitioner's operations. *Non constat* but that they may work to petitioner's advantage. For all that we know the presumption may establish *prima facie* that petitioner has borne the burden of the tax. Petitioner invites us to enter into a purely speculative inquiry for the purpose of condemning statutory provisions which have not been tried out and the effect of which cannot now be definitely perceived. We must decline that invitation and adhere to the fundamental principle which governs our determination of constitutional questions. . .

"The stated presumptions are rebuttable. If they work adversely to its interests, petitioner will have ample opportunity to prove all the rebutting facts. Section 907 (e) provides that either the claimant or the commissioner may rebut the presumptions 'by proof of the actual extent to which the claimant shifted to others the burdens of the processing tax.' There follows a detailed provision as to what such proof may include. But that provision is not exclusive. It is expressly stated that the proof in rebuttal shall not be limited to what is thus described."

Other objections to the procedure prescribed were briefly discussed, and found to be without merit.

MR. JUSTICE STONE and MR. JUSTICE CARDOZO concurred in the opinion, except that they reserved opinion as to the rights of the taxpayer in the event that it shall be impossible to ascertain whether the tax has been shifted.

MR. JUSTICE MCREYNOLDS dissented.

The case was argued by Messrs Joseph P. Brennan and William A. Sutherland for the petitioner, and by Solicitor General Reed and Assistant Attorney General Morris for the respondent.

Conflict of Laws—Treaties and International Compacts—Public Policy of States

The assignment by the Soviet Government to the United States, of all amounts due the former from American nationals, is sufficient to support an action by the United States for recovery of a sum of money deposited by a Russian corporation prior to 1918, which sum was nationalized and appropriated by the Soviet Government. The public policy of one of the states of the United States cannot prevail against the international compact effecting the assignment.

United States v. Belmont, et al., 81 Adv Op. 715; 57 Sup. Ct. Rep. 313 and 505.

This case dealt with a suit brought in a federal District Court in New York to recover money on deposit with August Belmont and Company, a private banker. The money had been deposited by a Russian Corporation prior to 1918. In that year the Soviet Government, by decree dissolved the corporation, together with others, and nationalized and appropriated all of its property and assets, including the deposit with Belmont. In November, 1933, the Soviet Government assigned to the United States the amounts due from American nationals to the Soviet Government, including the deposit in question. On demand the respondents refused to pay over the deposit and the Government brought suit. The District Court sustained a motion to dismiss the complaint and on appeal judgment was affirmed by the Circuit Court of Appeals. On certiorari this was reversed by the Supreme Court in an opinion by MR. JUSTICE SUTHERLAND.

In approaching the question for decision, it was pointed out that the assignment was given effect by an exchange of diplomatic correspondence between the Soviet Government and the United States for the purpose of bringing about final settlement of claims between them; that it was agreed that the Soviet Government would take no steps to enforce claims against American nationals; but that all such claims were assigned to the United States with an understanding that it would notify the Soviet Government of all amounts realized under the assignment.

The Circuit Court of Appeals took the view that the bank deposit was subject to the controlling public policy of New York State; could not be regarded as an intangible property right in Soviet territory; and that the decree of nationalization, if enforced, would give effect to an act of confiscation. It also took the view that an allowance of recovery would infringe the public policy of the United States. In rejecting these views MR. JUSTICE SUTHERLAND first stated that no inquiry was necessary as to the public policy of New York, since its policy could not prevail against the international compact involved. In elaboration of this he said in part:

"We do not pause to inquire whether in fact there was any policy of the State of New York to be infringed, since we are of opinion that no state policy can prevail against the international compact here involved.

"This court has held, *Underhill v. Hernandez*, 168 U. S. 250, that every sovereign state must recognize the independence of every other sovereign state; and that the courts of one will not sit in judgment upon the acts of the government of another, done within its own territory."

After citation of further authority on this point, MR. JUSTICE SUTHERLAND observed that the Court will take judicial notice of the fact that, coincident with the assignment, normal diplomatic relations were established with the Soviet Government the effect of which was to validate, so far as this country was concerned, the acts of the Soviet Government involved in the controversy here. The supremacy of the national government in international affairs was emphasized in the following portion of the opinion:

"Plainly, the external powers of the United States are to be exercised without regard to state laws or policies. The supremacy of a treaty in this respect has been recognized from the beginning. Mr. Madison, in the Virginia Convention, said that if a treaty does not supersede existing state laws, as far as they contravene its operation, the treaty would be ineffective. 'To counteract it by the supremacy of the state laws, would bring on the Union the just charge of national perfidy, and involve us in war.'

. . . And while this rule in respect of treaties is established by the express language of cl. 2, Art. VI, of the Constitution, the same rule would result in the case of all international compacts and agreements from the very fact that complete power over international affairs is in the national government and is not and cannot be subject to any curtailment or interference on the part of the several States. . . In respect of all international negotiations and compacts, and in respect of our foreign relations generally, state lines disappear. As to such purposes the State of New York does not exist. Within the field of its powers, whatever the United States rightfully undertakes, it necessarily has warrant to consummate. And when judicial authority is invoked in aid of such consummation, state constitutions, state laws, and state policies are irrelevant to the inquiry and decision. It is inconceivable that any of them can be interposed as an obstacle to the effective operation of a federal constitutional power."

The Court also expressed the opinion that no consideration of public policy of the United States could be relied upon to defeat the action of another government. With respect to this contention the opinion states:

". . . But the answer is that our Constitution, laws and policies have no extraterritorial operation, unless in respect of our own citizens. . . What another country has done in the way of taking over property of its nationals, and especially of its corporations, is not a matter for judicial consideration here. Such nationals must look to their own government for any redress to which they may be entitled. So far as the record shows, only the rights of the Russian corporation have been affected by what has been done; and it will be time enough to consider the rights of our nationals when, if ever, by proper judicial proceeding, it shall be made to appear that they are so affected as to entitle them to judicial relief. The substantive right to the moneys, as now disclosed, became vested in the Soviet Government as the successor to the corporation; and this right that government has passed to the United States. It does not appear that respondents have any interest in the matter beyond that of a custodian. Thus far no question under the Fifth Amendment is involved."

In conclusion MR. JUSTICE SUTHERLAND stated that nothing in the opinion was intended to foreclose the assertion of any claim to the moneys involved, by intervention or otherwise, on the part of parties not before the court.

MR. JUSTICE STONE concurred in the result but expressed inability to agree with the course of reasoning in support of it. He expressed the view that on the record there was no question requiring decision as to whether the United States, by the arrangement in question, may declare and enforce a policy inconsistent with the one the State of New York otherwise might adopt. In elaboration of his view he said in part:

"It does not appear that the State of New York, at least since our diplomatic recognition of the Soviet Government, has any policy which would permit a New York debtor to question the title of that government to a claim of the creditor acquired by its confiscatory decree, and no reason is apparent for assuming that such is its policy. Payment of the debt to the United States as transferee will discharge the debtor and impose on him no burden which he did not undertake when he assumed the position of debtor. Beyond this he has no interest for the state to protect. But it is a recognized rule that a state may rightly refuse to give effect to external transfers of property within its borders so far as they would operate to exclude creditors suing in its courts. . .

"It seems plain that, so far as now appears, the United States does not stand in any better position with respect to the assigned claim than did its assignor, or any other transferee of the Soviet government. We may, for present purposes, assume that the United States, by treaty with a foreign government with respect to a subject in which the foreign government has some interest or concern, could alter the policy which a state might otherwise adopt. It is unnecessary to consider whether the present agreement between the two governments can rightly be given the same effect as a treaty within this rule, for neither the allegations of the bill of complaint, nor the diplomatic exchanges, suggest that the United States has either recognized or declared that any state policy is to be overridden."

MR. JUSTICE BRANDEIS and MR. JUSTICE CARDOZO concurred in the opinion of MR. JUSTICE STONE.

The case was argued for the petitioner by Solicitor General Reed and Mr. David E. Hudson, and for the respondents by Mr. C. W. Wickersham.

Taxation—Processing Taxes—Payment to Philippine Islands of Tax on Coconut Oil

The provisions of Section 602½ of the Revenue Act of 1934 imposing a processing tax on coconut oil and allied productions, and providing for payment thereof to the Philippine Islands, are valid under the Federal Constitution.

Cincinnati Soap Company v. U. S., 81. Adv. Op. 707; 57 Sup. Ct. Rep. —.

In this opinion the Supreme Court passed upon the constitutional validity of Section 602½ of the Revenue Act of 1934 imposing a processing tax on coconut oil, and providing that all such taxes collected on coconut oil wholly of Philippine production shall be held as a separate fund and paid to the Treasury of the Islands. The Act provides further that if the Philippine Government provides by any law for any subsidy to be paid to producers of copra, coconut oil, or allied products, no further payments shall be made under the subsection into the Philippine Treasury.

In the two cases covered by the opinion domestic manufacturers of soap challenged the tax and filed petitions for refunds of payments on the ground that the tax was beyond the power of Congress. The Bureau of Internal Revenue and the trial courts denied the claims and the cases were taken to appropriate Circuit Courts of Appeals. On certiorari the validity of the tax was sustained by the Supreme Court in an opinion by MR. JUSTICE SUTHERLAND.

The grounds upon which the tax was challenged were that it is not imposed for any purpose contemplated by the taxing clause of § 8, Art. I, of the Constitution, in that it is not imposed to pay the debts or provide for the common defense or general welfare of the United States, but on the contrary, it is imposed for a purely local purpose, violating the Tenth Amendment; that it violates the due process clause of the Fifth Amendment, because it is an arbitrary exaction from one group of persons for the benefit of another; that it is not a true tax but a regulatory measure outside the field of federal power; that it violates clause 7, § 9, of Art. I of the Constitution which provides that "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law"; that payment of the entire proceeds to the Philippines, with no direction as to the expenditure thereof, constitutes an unlawful delegation of legislative power.

In dealing with these contentions, MR. JUSTICE SUTHERLAND first stated that the imposition of the tax in itself is clearly a valid exercise of federal taxing power; that the Tenth Amendment is without applica-

tion since the power of the states over local affairs is not involved.

The question was then considered whether the tax was rendered invalid by earmarking and devoting it to a specific purpose. In this connection it was observed that if both the tax and the purpose standing alone are proper, neither is rendered bad by their combination in the same act of legislation.

From this point of departure consideration was given to the propriety of the appropriation itself. In dealing with this question, the Court reviewed the relations between the United States and the Philippine Islands, emphasizing the extensive power and correlative responsibilities which have been exercised and assumed by the United States with respect to the Islands. As to this aspect of the case, the conclusion was reached that the appropriation was within the power of Congress. This conclusion was stated as follows in the opinion:

". . . The determination of Congress to recognize the moral obligation of the nation to make an appropriation as a requirement of justice and honor, is obviously a matter of policy and discretion not open to judicial review unless in circumstances which here we are not able to find. . .

"It does not follow that because a federal tax levied for the express purpose of paying the debts or providing for the welfare of a state might be invalid . . . that such a tax for the uses of a territory or dependency would likewise be invalid. A state, except as the federal Constitution otherwise requires, is supreme and independent. It has its own government, with full powers of taxation and full power to appropriate the revenues derived therefrom. A dependency has no government but that of the United States, except in so far as the United States may permit. The national government may do for one of its dependencies whatever a state might do for itself or one of its political subdivisions, since over such a dependency the nation possesses the sovereign powers of the general government plus the powers of a local or a state government in all cases where legislation is possible. . . To say that the federal government, with such practically unlimited powers of legislation in respect of a dependency, is yet powerless to appropriate money for its needs, is to deny—what the foregoing considerations forbid us to deny—that the United States has, in that regard, the equivalent power of a state in comparable circumstances."

Furthermore, the Court was of the opinion that the passage of the Philippine Independence Act in 1934 did not alter the situation so far as the power of Congress to make the appropriation is concerned. With reference to this it was pointed out that while the act modified the status of relations between the United States and the Islands, it did not terminate the sovereignty of the United States over the Islands.

Rejecting other contentions, the substance of the matter was summed up in the following portion of the opinion:

"Congress has power to create a local legislature for the Philippines; and it has done so. Congress has power to authorize the legislature to impose taxes for all the lawful needs of the islands, and to appropriate the proceeds for such uses and in such amounts as the legislature may determine . . . and this it has done. Congress has power to appropriate the moneys here in question, and cause them to be paid from the national treasury into the Treasury of the Philippine Islands; and for this it has provided. It would result in a strange anomaly now to hold that Congress had power to devolve upon the Philippine Government the authority to appropriate revenue derived from local taxation as the government saw fit, but that Congress was without power to confer similar authority in respect of moneys which lawfully will come into the Philippine Treasury from the Treasury of the United States or from other sources apart from taxation. It is true, as already appears, that the uses to which the money is to be put are not specified. But in all instances where funds shall come into the Philippine Treasury, we may indulge the presumption, in favor of a responsible and duly-constituted legislative body, that the funds will be appropriated for public purposes and not for private uses.

"Whether the payment to the Philippines of the large sums of money which will flow from this tax is unwarranted in fact; whether the present or prospective needs of the islands require it; and other queries directly or indirectly challenging the wisdom or necessity of the Congressional action, are all matters, as we repeatedly have pointed out, with which the courts have nothing to do. We find the legislation to be free from constitutional infirmity; and there both our power and responsibility end."

The case was argued by Messrs. Albert Bettman and Frederick H. Wood for separate Petitioners, and by Assistant Attorney General Jackson for the Respondents.

Rate Regulation—Valuation—Evidence

Under the Fourteenth Amendment, the requirements of a fair hearing in determining the valuation of public utility property for rate-making purposes are violated by the rate-fixing body, in resorting to evidence of values not placed in the record, and which the public utility is given no opportunity to rebut.

Ohio Bell Telephone Co. v. Public Utilities Commission of Ohio, 81 Adv. Op. 680; 57 Sup. Ct. Rep. 724.

This case involved a proceeding for the fixing of rates chargeable by the appellant for intrastate telephone service in Ohio. Under statutes then in force an increase might be suspended for 120 days, at the end of which time the rate was to go into effect upon the filing of a bond for repayment to consumers of such portion of the rate as might later be found to have been excessive, with interest. These proceedings are known as Pence Law proceedings.

In October, 1924, thirty-one such proceedings had been commenced, but had not been fully tried, though much evidence had been taken. Still other like proceedings were commenced later, and on October 14, 1924, the state Public Utilities Commission, on its own motion, directed a statewide investigation of the appellant's property and rates and consolidated the pending proceedings with such investigation. Accordingly it required the Company to file with the Commission on or before December 1, 1924, a complete inventory of all its property. The case then proceeded to a hearing for determination of the fair value of said property and of just and reasonable rates for service thereafter to be furnished by the company throughout the state of Ohio. The new proceeding thus instituted was confined to future rates, whereas the Pence Law proceedings constituted a basis for refunds of rates collected in the past. The statute requires that in fixing future rates the Commission shall ascertain the value of the property as of a date certain. The date selected for such valuation was fixed as June 30, 1925. An inventory was filed as required, with supplemental inventories every six months showing additions and retirements. A long investigation followed and a tentative valuation order, under date of January 10, 1931, was entered and the value of the property used in intrastate or interstate business was fixed at $104,282,735. Protests were filed by the company and by the state and municipalities. After further hearings and on January 16, 1934, the Commission made a final valuation as of June 30, 1925, valuing intrastate property

at $93,707,488, and the total valuation of the property at $96,422,276.

In addition, the Commission undertook to fix a valuation for each of the years from 1926 to 1933 inclusive. In so doing, it took judicial notice of price trends during such years. Such action was without warning until the filing of its report in 1934. The trend of valuation, according to the report, was ascertained from examination of the tax value in communities where the company had its largest real estate holdings; the building trends were determined after resort to price indices in the Engineering News Record, and labor trends were obtained from the same sources. Reference was also made to the findings of a federal court in Illinois as to the price levels on sales of apparatus and equipment by Western Electric. None of these findings were in evidence. On the valuations thus arrived at for various years, refunds were ordered running into millions of dollars.

The company protested and moved for a rehearing, urging that the resort to price indices and other evidence outside the record was in contravention of the requirements of the Fourteenth Amendment. After further proceedings, the Commission issued a final order which the State Supreme Court affirmed. On certiorari, the decree was reversed and remanded for further proceedings in an opinion by MR. JUSTICE CARDOZO. The opinion stresses particularly that the requirements of a fair hearing were disregarded by the Commission in resorting to evidence outside the record and in refusing to allow the company to be heard further for the purpose of rebutting such evidence. In this connection the opinion states:

"The fundamentals of a trial were denied to the appellant when rates previously collected were ordered to be refunded upon the strength of evidential facts not spread upon the record.

"The Commission had given notice that the value of the property would be fixed as of a date certain. Evidence directed to the value at that time had been laid before the triers of the facts in thousands of printed pages. To make the picture more complete, evidence had been given as to the value at cost of additions and retirements. Without warning or even the hint of warning that the case would be considered or determined upon any other basis than the evidence submitted, the Commission cut down the values for the years after the date certain upon the strength of information secretly collected and never yet disclosed. The company protested. It asked disclosure of the documents indicative of price trends, and an opportunity to examine them, to analyze them, to explain and to rebut them. The response was a curt refusal. Upon the strength of these unknown documents refunds have been ordered for sums mounting into millions, the Commission reporting its conclusion, but not the underlying proofs. The putative debtor does not know the proofs today. This is not the fair hearing essential to due process. It is condemnation without trial.

"An attempt was made by the Commission and again by the state court to uphold this decision without evidence as an instance of judicial notice. Indeed, decisions of this court were cited . . . as giving support to the new doctrine that the values of land and labor and buildings and equipment, with all their yearly fluctuations, no longer call for evidence. Our opinions have been much misread if they have been thought to point that way. Courts take judicial notice of matters of common knowledge. . . They take judicial notice that there has been a depression, and that a decline of market values is one of its concomitants. . . How great the decline has been for this industry or that, for one material or another, in this year or the next, can be known only to the experts, who may even differ among themselves."

The Court found without merit the contention that the appellant had estopped itself from objecting to the use of price trends gathered in the manner prescribed. As to this, MR. JUSTICE CARDOZO said:

"The company did not oppose the consolidation of the statewide investigation with the Pence Law proceedings. This did not amount, however, to a waiver of its right to have the value of its property determined upon evidence. At no stage of the inquiry was there any suggestion by the Commission that a different course would be pursued. We have no need to consider how the separate proceedings would have been affected by a valuation of the property in the general investigation if the evidence of value had been gathered in the usual way. In the thought of the state such a course would have obviated the necessity for separate evidence of value as to the exchanges under bond, but the company contended otherwise and made offers of proof in support of its contention. The merits of the opposing views in that regard may be put aside as irrelevant upon the record now before us. What is certain in any event is this, that nothing in the course of the trial gave warning of the purpose of the Commission, while rejecting evidence of value in respect of exchanges under bond, to wander afield and fix the composite value of the system without reference to any evidence, upon proofs drawn from the clouds. As there was no warning of such a course, so also there was no consent to it. We do not presume acquiescence in the loss of fundamental rights.

The case was argued by Mr. Karl E. Burr and Mr. W. H. Thompson for the appellant, and by Mr. Donald C. Power and W. W. Metcalf for the appellee.

SUMMARY OF OTHER BUSINESS OF SUPREME COURT—MARCH 29 TO MAY 24, 1937

Oral arguments presented during the sessions of the Court which were held between Monday, March 29, 1937 and Monday, April 12, 1937; and between Monday, April 26, 1937 and Wednesday, May 5, 1937, at which date argument of cases was suspended for the term, included the following cases:

35 & 36 (Oct. Term, 1935) — *Smith, Executor* v. *Hall, et al.* and *Smith, Executor* v. *James Manufacturing Company, et al.*—reargued April 5 and April 6, 1937 by Mr. Dean S. Edmonds and Mr. Albert L. Ely for petitioner, by Mr. Thomas G. Haight for Hall, et al. and by Mr. H. A. Toulmin, Jr. for James Manufacturing Company, et al. Decided, opinion April 26, 1937.

202 & 285 (Oct. Term, 1935) — *Stone et al., Trustees, etc.* v. *White, Former Collector, etc.* and *United States, ex rel., Girard Trust Company, Trustee, etc.*, v. *Helvering, Commissioner, etc.*—argued April 29, 1937 by Mr. Thomas Allen for Stone, et al., by Mr. H. Cecil Kilpatrick for United States, ex rel., Girard Trust Company, etc., and by Mr. J. Paul Jackson for Helvering and White. Decided, opinions, May 24, 1937.

604 — *Ray* v. *United States*—argued March 30, 1937 by Mr. Reynolds Robertson for petitioner and Mr. Gordon Dean for respondent. Decided, opinion April 26, 1937.

621 — *First National Bank & Trust Company of Bridgeport, Connecticut, Trustee* v. *Beach*—argued April 27 and April 28, 1937 by Mr. Arthur B. Weiss for petitioner and Mr. Sydney P. Simons for respondent. Decided, opinion May 17, 1937.

625 — *James, Individually and as State Tax Commissioner of West Virginia* v. *The Dravo Contracting Co.*—argued April 26 and April 27, 1937 by Mr. Clarence W. Meadows for appellant and Mr. William S. Moorehead for appellee.

627 — *Mumm* v. *Jacob E. Decker & Sons*—argued March

29, 1937 by Mr. Ralph F. Merchant for petitioner and Mr. Maurice M. Moore for respondent. Decided, opinion April 26, 1937.

638 *Hiram Steelman, Trustee, etc.* v. *All Continent Corporation*—argued March 29 and March 30, 1937 by Mr. William D. Whitney for petitioner and Mr. Murry C. Becker for respondent. Decided, opinion April 26, 1937.

647 *First Bank Stock Corporation* v. *Minnesota*—argued March 31, 1937 by Mr. Joseph H. Colman for appellant and Mr. William S. Ervin and Mr. Frank J. Williams for appellee. Decided, opinion April 26, 1937.

652 *The Great Atlantic & Pacific Tea Company et al.* v. *Grosjean, Supervisor etc. et al.*—argued March 30 and March 31, 1937 by Mr. Monte M. Lemann and Mr. Robert L. Wright for appellants and by Mr. E. Leland Richardson for appellees. Decided, opinion May 17, 1937.

658 *Senn* v. *Tile Layers Protective Union, etc. et al.*—argued March 31 and April 1, 1937 by Mr. Leon B. Lamfrom for appellant and Mr. Joseph A. Padway for appellees. Decided, opinion May 24, 1937.

660 *Lindsey et al.* v. *Washington*—argued May 3, 1937 by Mr. Spencer Gordon for petitioners and Mr. C. C. Quackenbush and Mr. Ralph E. Foley for respondent. Decided, opinion May 17, 1937.

688 *Shulman et al.* v. *Wilson-Sheridan Hotel Company et al.*—argued April 5, 1937 by Mr. Meyer Abrams for petitioners and Mr. C. S. Bentley Pike for respondents. Decided, opinion April 26, 1927.

703 *Old Colony Trust Company, Trustee* v. *Commissioner of Internal Revenue*—argued April 29 and April 30, 1937, by Mr. Harold S. Davis for petitioner and Mr. A. F. Prescott for respondent. Decided, opinion May 17, 1937.

713 *Dodge et al.* v. *Board of Education of the City of Chicago et al.*—argued April 28, 1937 by Mr. Allan J. Carter for appellants and Mr. Frank S. Righeimer for appellees.

716 *Great Lakes Transit Corporation* v. *Interstate Steamship Company et al.*—argued April 28 and April 29, 1937 by Mr. John B. Richards for petitioner and Mr. Ray M. Stanley for respondents.

724 & 797 *Carmichael, Individually and as Attorney General of Alabama et al.* v. *Southern Coal & Coke Company* and *Carmichael, Individually and as Attorney General of Alabama et al.* v. *Gulf States Paper Corporation*—argued April 7 and April 8, 1937 by Mr. Albert A. Carmichael and Mr. Peyton D. Bibb for Carmichael, et al. and by Mr. Borden Burr for Southern Coal & Coke Company and by Mr. Forney Johnston for Gulf States Paper Corporation. Decided, opinion May 24, 1937.

731 *The National Fertilizer Association, Inc., et al.* v. *Bradley, Individually etc., et al.*—argued April 5, 1937 by Mr. W. C. McLain and Mr. Daniel S. Murph for appellants and by Mr. J. Ivey Humphrey and Mr. William C. Wolfe for appellees. Decided, opinion April 26, 1937.

734 *United States et al.* v. *American Sheet & Tin Plate Company et al.*—argued April 9 and April 12, 1937 by Mr. Daniel W. Knowlton for appellants and by Mr. David A. Reed for American Sheet and Tin Plate Company and by Mr. John S. Burchmore for Allegheny Steel Company et al., appellees. Decided, opinion May 17, 1937.

743 *A. A. Lewis and Company et al.* v. *Commissioner of Internal Revenue*—argued April 30, 1937 by Mr. Franz W. Castle for petitioners and Mr. Andrew D. Sharpe for respondent. Decided, opinion May 17, 1937.

753, 754 & 755 *Aetna Insurance Company* v. *Kennedy, to the use of Bogash; Springfield Fire & Marine Insurance Company* v. *same;* and *The Liverpool and London and Globe Insurance Company, Limited,* v. *same*—argued April 30, 1937 by Mr. Horace M. Schell for petitioners and Mr. Harry Shapiro for respondent. Decided, opinion May 17, 1937.

765 *The Mantle Lamp Company of America* v. *Aluminum Products Company*—argued May 3, 1937 by Mr. George I. Haight for petitioner and Mr. William N. Cromwell for respondent. Decided, opinion May 24, 1937.

773 *Silas Mason Company, Inc., et al.* v. *Tax Commission of Washington et al.*—argued April 27, 1937 by Mr. B. H. Kizer for appellants and Mr. E. P. Donnelly for appellees.

774 *Ryan* v. *Washington et al.*—argued April 27, 1937 by Mr. E. D. Weller and Mr. B. H. Kizer for appellant and Mr. E. W. Schwellenbach and Mr. E. P. Donnelly for appellees.

781 *Townsend et al., etc.* v. *M. J. Yoemans, Attorney General of Georgia, et al.*—argued May 3, and May 4, 1937 by Mr. William Hart Sibley and Mr. Robert C. Alston for appellants and Mr. O. H. Dukes and Mr. L. W. Branch for appellees. Decided, opinion May 24, 1937.

804 *Railroad Commission of California et al.* v. *Pacific Gas and Electric Company*—argued April 30, 1937 by Mr. Ira H. Rowell for appellants and Mr. Warren Olney, Jr. for appellee.

824 *Thomas, Collector of Internal Revenue* v. *Perkins et al.*—argued May 4 and May 5, 1937 by Mr. J. Louis Monarch for petitioner and Mr. Harry C. Weeks for respondents.

907 *Duke* v. *The United States*—argued May 4, 1937 by Mr. Jesse C. Duke, *pro se* and Mr. William W. Barron for the United States. Decided, opinion May 24, 1937.

910 *Helvering, Commissioner, etc., et al.* v. *Davis*—argued May 5, 1937 by Mr. Assistant Attorney General Jackson and Mr. Charles E. Wyzanski, Jr. for petitioners and Mr. Edward F. McClennen for respondent. Decided, opinion May 24, 1937.

During the sessions of the Court included in this summary, which covers the remainder of the October 1936 term, excepting only the orders announced June 2, when the term ended, orders were announced as follows:—

(1) Probable jurisdiction was noted in 6 cases on appeal. In one of these cases (No. 807) a motion to dismiss the appeal was subsequently denied, and in another (No. 804), a motion to affirm was postponed to the hearing on the merits. In one appeal No. 777) the question of jurisdiction of the Court was postponed to the hearing on the merits. One appeal (No. 600) was dismissed on notice of appellants. Review on appeal was allowed in the following cases:

773 *Silas Mason Company, Inc., Walsh Construction Company, et al.* v. *Tax Commission of the State of Washington, et al.*

774 *Ryan* v. *The State of Washington, et al.*

777 *Breedlove* v. *Suttles, as Tax Collector.*

781 *C. R. Townsend and Park Bernard, A Partnership Known as Townsend & Bernard, doing business as Cook County Warehouse* v. *Yoemans, Attorney General of Georgia, et al.*

804 *Railroad Commission of California, Leon O. Whitsell, Wallace L. Ware, et al.* v. *Pacific Gas and Electric Company.*

807 *United Gas Public Service Company* v. *Texas, Mrs. Miriam A. Ferguson, for the Governor of Texas, et al.*

832 *Henry O. Hale and Elizabeth C. Hale* v. *The Iowa State Board of Assessment and Review.*

(2) Petitions for certiorari were grainted in 34 cases and denied in 151. Certiorari was dismissed in 3 cases on motion of petitioner and in 2 cases by stipulation of counsel. Review on certiorari was allowed in the following cases:

660 *Elbert B. Lindsey and E. R. Lindsey* v. *State of Washington.*

743 *A. A. Lewis & Company, Main and Lincoln Avenue Subdivision, Trust No. 1923, et al.* v. *Commissioner of Internal Revenue.*
750 *D. W. McEachern, Administrator of the estate of S. C. McEachern, deceased* v. *J. T. Rose, Former Collector of Internal Revenue for the District of Georgia.*
753 *Aetna Insurance Co.* v. *John M. Kennedy, 3d, to the use of Anna L. Bogash.*
754 *Springfield Fire & Marine Insurance Co.* v. *Same.*
755 *The Liverpool and London and Globe Insurance Co., Limited* v. *Same.*
765 *The Mantle Lamp Co. of America* v. *Aluminum Products Co.*
787 *Ocean Beach Heights, Inc., Normandy Beach Development Co. et al.* v. *The Brown-Crummer Investment Co., Town of North Miami, et al.*
795 *United States* v. *Williams.*
803 *A. M. Anderson, Receiver of the National Bank of Kentucky of Louisville* v. *Peter L. Atherton, Administrator of the estate of John M. Atherton, deceased, et al.*
824 *W. A. Thomas, Collector of Internal Revenue* v. *J. J. Perkins, et al.*
825 *Federal Trade Commission* v. *Standard Education Society, et al.*
830 *Bogardus* v. *Commissioner of Internal Revenue.*
836 *Texas & New Orleans Railroad Co., et al.* v. *Neill, et al.*
837 *Charles C. Steward Machine Co.* v. *Harwell G. Davis, Individually and as Collector of Internal Revenue.*
842 *The People of Puerto Rico* v. *Shell Co., (P. R.) Ltd., et al.*
848 *Palmer* v. *Commissioner of Internal Revenue.*
853 *Thomas W. White, Individually and as Former Collector of Internal Revenue* v. *Aronson, Trustee.*
854 *Groman* v. *Commissioner of Internal Revenue.*
862 *Mayer* v. *Commissioner of Internal Revenue.*
865 *Chicago Title and Trust Co., as Successor Trustee under the Trust Deed recorded as Document No. 10325493* v. *Forty-One Thirty-Six Wilcox Bldg., Corporation.*
866 *Same* v. *Same.*
878 *Pennsylvania, ex rel. Sullivan* v. *Ashe, Warden.*
886 *Berman* v. *United States.*
887 *Helvering, Commissioner of Internal Revenue* v. *Gowran.*
890 *Texas and Clopton and Hyder, Receivers* v. *Donoghue, Trustee Trinity Refining Co.*
896 *Helvering, Commissioner of Internal Revenue* v. *Pfeiffer.*
905 *United States, on Relation of Wiloughby, as Trustee in Bankruptcy of National Mechanical Service Co., et al.* v. *Sam Howard and Continental Casualty Co.*
909 *Vogt, sheriff* v. *Murphy.*
910 *Helvering, Commissioner, and Welch, Collector of Internal Revenue for Massachusetts, et al.* v. *Davis.*
911 *Ross, as Receiver of the First National Bank of Perry* v. *Knott, as Treasurer State of Florida, et al.*
916 *Helvering, Commissioner of Internal Revenue* v. *Bashford.*
922 *Worcester County Trust Co., executor* v. *Riley, Controller State of California, et al.*
934 *Willing, Receiver Commercial National Bank, Philadelphia, Pa.* v. *Binenstock, individually and as surviving partner of partnership firm of Swinger and Binenstock, et al.*

(3) Rehearings were denied in 36 cases previously decided; of these 3 involved the previous affirmance (Nov. 23, 1936) without opinion and by an equally divided Court in Mr. Justice Stone's absence, of judgments of the New York Court of Appeals sustaining the constitutionality of the New York State Unemployment Insurance Law.

(4) In the following cases the Appeals were dismissed with per curiam memoranda:—

818 *Whitmore* v. *Salt Lake City, Bacon, as State Engineer of State of Utah et al.* Decided March 29, 1937.
875 *Espenlaub* v. *State of Indiana.* Decided April 26, 1937.
906 *Catholic Order of Foresters, a Fraternal Benefit Society, Inc.* v. *State of North Dakota.* Decided May 3, 1937.
938 *Painter v. State of Ohio.* Decided May 24, 1937.
944 *Fearon* v. *Treanor.* Decided May 24, 1937.
947 *Grubb* v. *Lawman, Receiver.* Decided May 24, 1937.

(5) The Court was asked to exercise its original jurisdiction by 1 motion for leave to file a complaint; by 2 motions for leave to file petitions for writs of certiorari; by 2 motions for leave to file petitions for wrists of habeas corpus; and by 1 motion for leave to file a petition for writs of prohibition or mandamus. All were denied.

In No. 11, original, *Arkansas* v. *Tennessee,* Mr. Monte M. Lemann of New Orleans, Louisiana, was appointed Special Master to make and file findings, conclusions, and recommendations for a decree (May 17, 1937).

In No. 12, original *Texas* v. *New Mexico, et al.,* the *ad interim* report of the Special Master, Mr. Charles Warren, was filed and he was authorized to postpone hearings at his discretion, until such date after October 1, 1937, and prior to January 15, 1938, as he determines (April 5, 1937).

In No. 13, original, *Texas* v. *Florida, et al.,* the answers of the Defendant were received and ordered filed (May 24, 1937).

(6) No. 35, *Smith* v. *Hall, et al.,* and No. 36, *Same* v. *James Manufacturing Co. and Elmira Hatcheries, Inc.,* Mr. S. Harold Smith, executor, was substituted as petitioner (April 5, 1937).

No. 625, *Fox* v. *Pravo Contracting Co.,* Ernest K. James, Commissioner, was substituted for Fred L. Fox, former Commissioner, as appellant (April 26, 1937).

No. 712, *Phillips Pipe Line Co.,* v. *Missouri,* was continued to the October term, 1937, on motion of the Attorney General of Missouri (March 29, 1937).

No. 922, *Worcester County Trust Co., Executor* v. *Riley, Controller of State of California, et al.,* The motion of the Commissioner of Corporations and Taxation for Massachusetts for leave to intervene was granted (May 24, 1937).

No. 1005, *Tennessee Valley Authority, et al.* v. *Tennessee Electric Power Co., et al.* The motion of petitioner to shorten time for filing respondent's brief was denied (May 24, 1937).

(7) Rule 1 of the Rules of Practice and Procedure in Criminal cases was amended to apply to sentences imposed "after a plea of guilty, or a verdict of guilt by the trial court where a jury is waived"; and to require any judgment setting forth such a sentence to be signed by the judge who imposed the sentence, and entered by the clerk. Otherwise the rule was unchanged (May 24, 1937).

(8) The Court recessed from Monday, April 12th, to Monday, April 26th; from Wednesday, May 5th, until Monday, May 17th; after Monday, May 17th, until Monday, May 24th, and after Monday, May 24th, until Tuesday, June 1st, when it adjourned for the term. The call of the Docket was suspended for the term at the conclusion of the arguments in cases on call for Monday, May 3, 1937.

London Letter

Shorthand Writers in Supreme Court.

THE Committee appointed to consider the technical and administrative problems involved in the establishment of a system for taking an official shorthand note in the Supreme Court, and to report in what manner they can best be solved, has issued its Report. The Committee, of which the Hon. Mr. Justice Atkinson was Chairman, was appointed in pursuance of the recommendation of the Royal Commission on the Despatch of Business at Common Law. It is pointed out that there are two branches of the work involved, note taking in London and note taking on Circuit. In view of the fact that the number of King's Bench Courts sitting at one time varies very much, that at any moment a case may come into the list in which the parties require day to day transcripts, and that such transcripts demand the services of at least five Writers and dictatees, the Committee is satisfied that it is impossible to ask for the creation of salaried writers unless there is no other scheme possible. They therefore suggest that the work should be done by the Institute of Shorthand Writers, whose members, comprising as they do the great majority of men at present doing the work of the Courts, understand what is wanted. It is recommended that an Association be formed by the Institute and that the Association should accept the responsibility of providing the writers for all witness actions in the Chancery and King's Bench Courts. The expense of taking a note, if the Committee's recommendation is adopted, will be a charge on the vote. At Assizes the system now in force for criminal work is that a single firm is appointed for each Assize town and it is suggested that the civil work should be offered to the firm responsible for the criminal work. Should the firm be unable to cope with the work the Association will accept responsibility for it.

The Committee is of opinion that an appellant must be under an obligation to provide three transcripts of the official note of the evidence, summing-up and judgment for the use of the Court of Appeal, and that these transcripts should be costs in the cause. It is believed that this note will usually take the place of the Judge's note, although a Judge would have to take a note sufficient for his own purpose. Where the Judge is of opinion that his own note would suffice it was suggested that an appellant should supply only this note to the Court of Appeal. The costs of the transcript for the Court of Appeal would be costs in the cause.

To meet the objection that a would-be appellant may be unable to pay for transcripts it is suggested that the Judge should have power to order that the appellant be entitled to the transcript for the Court of Appeal at the expense of the vote, where he is satisfied that the appellant is in such poor circumstances that appeal would be denied to him if he had to pay for the transcript and that there is reasonable ground for appeal. In the event of the trial Judge requiring a transcript of any part of the evidence the cost of such transcript, it is recommended, should be costs in the cause. It is suggested that the Probate, Divorce and Admiralty Division should come into line with the scheme, placing the responsibility upon the Association.

Inner Temple Record.

The Inner Temple has just published a fifth volume of their Calendar of Records edited, as was the fourth volume, by R. A. Roberts, a barrister of the Inn. This volume covers the period 1751 to 1800. It is enriched by ten illustrations, including those of Robert, Lord Henley, Lord Chancellor 1761-1766; Edward, Lord Thurlow, Lord Chancellor, 1778 to June 3, 1783, and again from December, 1783 to 1792; and of Francis Maseres, Cursitor Baron of the Exchequer, who gave many books, as well as pictures of King George II and Queen Caroline to the Society. The volume also contains a reproduction of a picture of the Temple in 1671, which was re-engraved by Bayley in 1770 under the direction of the Master of the Temple at the desire of the Masters of the Bench. The editor, in his interesting introduction, observes that the history of the fifty years covered is essentially one of much stability. As an example he refers to the wine account. The Masters of the Bench at their daily meal in term time drank much claret, a hogshead at least every year, for which they paid throughout an almost equal price between £55 and £60 except for the last five years when the price went up a little. The privilege of wine drinking was not extended to barristers, who were obliged to quench their thirst with beer. On one occasion (on June 14, 1790) a motion was made and seconded that a bottle of wine be sent daily to each mess of barristers in commons and to commence on the first day of Michaelmas term, but, the question being put, it was promptly negatived.

It is interesting to note that during the early years with which this volume deals there was little desire on the part of members to become Masters of the Bench, and that even those already occupying such positions seem to have accepted calls to the Bench of other Inns of Court, for, in February, 1758, a Bench Table Order was made to the effect that any Master of the Bench accepting a call to the Bench of other Societies of Inns of Court should no longer continue to enjoy or hold a Bench Chamber or receive or take any benefit or advantage therefrom, but his admission to such Bench Chamber or his appointment to the office of Treasurer should thenceforth cease and be void to all intents and purposes as fully and effectually as if the person so called to the Bench of any other Society was immediately after such call actually deceased. No reason seems to be evident for this reluctance to serve on the Bench of the Society. Many interesting items are to be found in the accounts of the Inn reproduced in the volume, the most tragic of which are perhaps those relating to the unwanted babes "dropt" within the confines of the Inner Temple. In 1766 there is a review of the numbers, namely, "dropt 37; died 25; placed out 6; remain 6." One entry, in the extracts from disbursements 1752-53 may be selected as an illustration of these items, namely: "Paid Elizabeth Fox for nursing Charles Temple, six weeks, when he died, and physic for him £1:0:3." It may be noted that all of these unwanted children received the surname of Temple.

The Hon. Mr. Justice Eve has retired from the position of Judge of the Chancery Division of the

High Court of Justice, a position which he has held for thirty years. He was born on the 13th October, 1856, educated privately and at Exeter College, Oxford, and called to the Bar at Lincoln's Inn in 1881. He took silk in 1895, became a Master of the Bench of his Inn in 1899, and Treasurer in 1924. It is seldom that a Judge has been so successful in his great office or has been so acceptable to both lawyers and litigants. The high regard in which he is held is aptly expressed in the terms of a resolution which was passed unanimously at a recent meeting of the Council of the Law Society. It was resolved: "That the Council have observed with very great regret the announcement that Sir Harry Eve has retired from the Bench. They have regarded him for many years as a specially distinguished member of the Judicature who has rendered remarkably valuable services to the public. They desire at this time also to record their gratitude to Sir Harry Eve for the many and unostentatious acts of kindness which he has rendered to his own profession and particularly to the Law Society and to the provincial law societies and their members. There has never been a more welcome friend at their meetings, and Sir Harry Eve's presence has been deeply appreciated there. The Council desire in this manner to record their sense of the great public services which Sir Harry Eve has rendered, their pleasure that he has been appointed a member of His Majesty's Privy Council, and their hope that for many years to come he may be spared to enjoy his well earned leisure."

Mr. Gavin Turnbull Simonds, K. C., has been appointed to fill the vacancy caused by Mr. Justice Eve's retirement. Mr. Simonds was called to the Bar at Lincoln's Inn in 1906 and took silk in 1924. He has enjoyed one of the most successful practices at the Chancery Bar in recent years.

Selden Society

At the 52nd General Meeting of the Selden Society, held at Lincoln's Inn on the 11th March last, the President, the Rt. Hon. Lord Wright, Master of the Rolls, in the course of his Presidential Address, reminded members of the Society that the present is the fiftieth year of its existence, and that during that period fifty-five volumes of the Society's publications have been issued, as well as three additional volumes. He made reference to the useful work the Society had already done, and mentioned the plans which had been made to carry on that work. Lord Wright regretted that the membership was so small, especially now when the studies of law are developing so magnificently in the Universities of Oxford and Cambridge as well as London. He noted that there are only about 150 Members in the United States of America. In view of the interest and activity in the field of legal research which has been shown in recent years in the States, one must agree that the figure is surprisingly low and, for the benefit of those who wish to devote time to the study of legal history, it may not be out of place to mention that Mr. Richard W. Hale of 60 State Street, Boston, Mass., is the Local Hon. Secretary and Treasurer of the Society in the United States of America.

Lawyers.

At a dinner of the City of London Solicitors' Company held on March 4th last, the Lord Mayor of London, Sir George Broadbridge, in responding to the civic toast expressed the view that Lawyers are a very clever set of men who, if ever they failed in law might make a good living at carpentry. They could, he said, file a bill, split a hair, chop logic, dovetail an argument, make an entry, get up a case, frame an indictment, empanel a jury and put them in a box, bore a Court and chisel a client. He went on to say that the fact that juries were employed at the Old Bailey reminded him that a jury had once been defined as "a body of men to find out which side had the smartest solicitor."

S.

The Temple.

President's Proposals with Respect to Federal Courts

(*Continued from page* 419)

and keep the faith. I do not mean to deny that there have been times when the possibility of judicial review has worked the other way. Legislatures have sometimes disregarded their own responsibility, and passed it on to the courts. Such dangers must be balanced against those of independence from all restraint, independence on the part of public officers elected for brief terms, without the guiding force of a continuous tradition. On the whole, I believe the latter dangers to be the more formidable of the two. Great maxims, if they may be violated with impunity, are honored often with lip-service, which passes easily into irreverence. The restraining power of the judiciary does not manifest its chief worth in the few cases in which the legislature has gone beyond the lines that mark the limits of discretion. Rather shall we find its chief worth in making vocal and audible the ideals that might otherwise be silenced, in giving them continuity of life and of expression, in guiding and directing choice within the limits where choice ranges. This function should preserve to the courts the power that now belongs to them, if only the power is exercised with insight into social values, and with suppleness of adaptation to changing social needs."

ADVISORY COMMITTEE OF U. S. SUPREME COURT SUBMITS COMPLETE REVISION OF DRAFT

The Advisory Committee, appointed by the Supreme Court of the United States to prepare and submit to the Court proposed rules of civil procedure for the district courts, submitted to the Court on April 30, 1937, a complete revision of the Preliminary Draft submitted for suggestions to the bench and bar in May, 1936.

At the suggestion of the Advisory Committee the Court has directed that copies of the new draft of proposed rules be submitted for suggestions to all Federal judges, to the committees appointed in each district and to all who have heretofore manifested their interest by submitting suggestions. These copies have already been mailed. The Committee has available some additional copies. Anyone desiring a copy should send his request to

Advisory Committee on Rules for Civil Procedure,
Supreme Court of the United States Building,
Washington, D. C.

CURRENT LEGAL LITERATURE

A Department Devoted to Recent Books in Law and Neighboring Fields and to Brief Mention of Interesting and Significant Contributions Appearing in the Current Legal Periodicals

Among Recent Books

FEDERAL JUSTICE: CHAPTERS IN THE HISTORY OF JUSTICE AND THE FEDERAL EXECUTIVE, by Homer Cummings and Carl McFarland. 1937. New York: The Macmillan Company. Pp. xiv, 576. The book, for all its title, is a thorough-going history of the office of Attorney General of the United States and of the Department of Justice, from 1790 to 1936. It explores a little into earlier days, among English and colonial precedents for crown or state attorneys, and the constitutional background for the office, if any there was. Attorney General Cummings sponsors the book and contributes an introduction, giving credit in several quarters. It seems clear to the reviewer that a Cabinet officer could have found little time for the impressive quantity of search and study of files and memoirs upon which the book is built. Mr. McFarland must have been the mason and carpenter, whoever was the architect.

The book is dense with facts, contains much new detail and will serve as an important reference and source work. Indeed, while not so warm-blooded a work as Warren's "Supreme Court in United States History", it belongs on the same shelf with those volumes and with the other Warren's "History of the American Bar". There are few other books which deal comprehensively with our American legal institutions. Here and there the interpretations of events are tinted a little with current political views, and the chapter headings incline to the flamboyant, as in the case of "Unholy Sanctuary", and "Taney and the Monster", and "Unwanted Men". The first phrase cloaks a history of the limits of Federal criminal jurisdiction, the second disguises a chapter on the Second Bank of the United States, and the third a history of the Federal prisons. This Alice-in-Wonderland attitude toward the imperfect past seen from the gloriously enlightened present is not evident in the text. It goes soberly, but by no means clumsily. The volume is history, painstakingly excavated and arranged, with a stream of documentary citations. The authors have moved and sampled a quantity of official files, letter and opinion books, never before violated by inquiring eyes. There is a good index.

From Randolph to Cummings fifty-five men have served as Attorney General. Perhaps eighteen of these are figures of national fame. Only two or three have any shadow on their names. It makes a distinguished list. Incidentally nine, as the reviewer counts them, served later on the United States Supreme Court and six others were nominated as members of it but failed of the Senate's consent. "Federal Justice" is not concerned primarily with men, however, but rather with struggle and the development of the institution and office.

Edmund Randolph, soldier, lawyer and politician, came to New York in 1790 as Attorney General "for the Supreme Court". He was not the last of these appointees to have been the personal counsel of the appointing President. The salary was $1,500. It was supposed the prestige and freedom for private practice would supplement the salary. Randolph was not primarily adviser to the executive but rather barrister before a rather idle Supreme Court. It was two years before he sat in the cabinet. Until 1814 the holder of the post was often an absentee from the capital. In 1817 the vigorous William Wirt, now with a salary of $3,000, for the first time succeeded in getting offices in the Treasury, a clerk and a little expense fund for the holder of the post. It was in the 1850s when "law Assistants" became recognized parts of the establishment. Meantime, in 1830, a Solicitor for the Treasury was set up, almost independent of the Attorney General. He assumed important responsibilities over opinions on taxes, debts and property of the government as these matters fell largely into the Treasury domain. Not until 1870 was a Department of Justice organized. It was 1895 before the prison at Leavenworth taken over from the War Department made the beginning of a Federal penitentiary system. Just before the Civil War the attorney general had begun to supervise judicial appointments in place of the State Department. The treasury with its vast patronage kept interfering until about 1900.

To this reviewer, the chapters on the various epochs of legal warfare between the government and successive groups of private enterprises are the most interesting in the book. Something on all these topics has been written elsewhere and even often, but here the acts of the endless drama are assembled in order, with some new candles of light on the stage. The judicial skirmishing over slavery, over public lands with its villains in the form of grabbers large and grabbers small, over the railroad concessions which irritated the public, bring us to a forgotten chapter on the telephone. For years the question of the telephone patents and their foundation for a monopoly in the Bell group kept the government in extraordinary involvements. We move on to the trust-busting period, and then to the battles over conservation, where men lost their tempers so violently, to the various stages of labor battles and labor in politics to the recently successful war on organized crime. Through it all march the fifty-five Attorneys General, (as we write it) or Attorney Generals (as we speak it), big and little, but all part

lawyer and part politician. The office has not yet attained all the clarity and high minded independence of political concession that the country deserves.

The volume is pleasantly bound and fairly illustrated. It is workmanlike and useful but not for the reading of him who runs.

JAMES GRAFTON ROGERS.

New Haven, Conn.

Invention and the Law. By Harry Aubrey Toulmin, Jr. Foreword by Arthur C. Denison. New York: Prentice Hall, Inc., 1936. The author suggests that Chapter I, which deals with the background, may be skipped by experts. It is intended, Mr. Toulmin says, for persons who have no occasion to deal with the subject in any detail. This reviewer believes that the twenty-six pages of this chapter ought to be read by every lawyer who is at all interested in one of the things which has greatly contributed to this country's economic development—the American patent system. It also would be wholesome reading for others as well, particularly those who use the opprobrious term monopoly as applied to patents for inventions. That is what A. P. Herbert calls a "witch word." Coke's definition of a monopolist is "one who by reason of his exclusive privilege *takes something from the public which they had the right to use* before the grant of such exclusive privilege." Of course a patent is a monopoly but not in this sense. An invention is a contribution to the general store of public knowledge *of something the public did not have before.* Therefore, the granting to the inventor of a temporary monopoly does not deprive the public of anything. It wouldn't have had the invention except for the stimulation afforded by the prospective reward of a temporary monopoly. This chapter, admirable as it is, contains a printer's error worthy of a place with the immortals enshrined in Burton's Book Hunter. On page 23, note 9 is as follows, "House Report No. 1161, 62nd Congress, 2nd Session, pp. 2-3 referred to as "Oldfiend Report of 1912." The member of Congress who gave his name to this report was *Oldfield*. Maybe the printer is to blame for printing it "Oldfiend." Maybe it is the author's very subtle irony. Most people who remember the hearings conducted by the Oldfield Committee, I think would be inclined to say, "Don't change it, let her ride."

The remainder of the book is a discussion of what is and what is not invention. In this field there are no absolutes. Invention requires something more than the ingenuity and skill possessed by an ordinary mechanic acquainted with the business. Invention involves an operation of the intellect, is a product of intuition or of something akin to genius as distinguished from mere mechanical skill—it is a flash of inspiration that, out of the darkness in which it lay concealed, first revealed a possibility. Invention is the idea itself, the burst of new thought. These sentences are out of cases, illuminating perhaps but not helpful in solving concrete problems—for what is the skill of an ordinary mechanic, what is intuition, what is genius? Mr. Toulmin has collected the leading cases under appropriate headings. He has quoted from them at length. For these reasons this book is bound to be a useful thing to have on the counsel table when a patent case is going on. It may prevent that annoying and common experience, the familiar, but often futile, hunt for a lost reference.

EDWARD S. ROGERS.

Chicago.

A Constitutional History of British Guiana, by Sir Cecil Clementi. London: Macmillan & Co., Ltd. 1937. Pp. xxii, 547.—Sir Cecil Clementi's interesting work suffers perhaps in some degree in the eyes of the student of Law from the fact that it has been written with a definite purpose of defending the constitutional changes effected in 1928. His experience in the administration of British Guinea convinced him that the former constitution was incapable of successful operation and that Crown Colony rule must necessarily be introduced. His opinion is naturally based on considerations of great importance, but it would have been more satisfactory had the counter arguments been duly set forth. It is quite true that the fact that the elective members of the legislature presented a memorandum in 1928 is duly recorded (p. 398), but no attempt is made to set out their case or to refute it. Moreover, nothing whatever is said to establish that the new regime has done anything substantial to improve the conditions of the colonists. It would have been possible, on the basis of the Colonial reports since the reforms were introduced, to make out a case to this effect and the failure to do so is rather disappointing. Sir C. Clementi, not unnaturally from his experience, holds the common view that it is better to govern men well than to allow them in some measure to govern themselves, if in doing so they do not conform with a high standard of financial efficiency. But it is noteworthy that the elected members are by no means convinced that the reforms have effected any important result, and impartial critics of British policy in the West Indian Crown Colonies, such as Professor Macmillan, do not appear much impressed with the results achieved for the colored population by that form of government. The author's citation of Aristotle's views would be fatal, if deemed valid, to the great constitutional experiments now being tried in India, Burma, and Ceylon. Nor does he face the fact that a serious measure of responsibility for the demerits of the former constitution rested on successive British governments, which had a clear duty to intervene but which acquiesced in conditions far more unsatisfactory than those of 1927-8. The story of successive patching of a very unsatisfactory and more or less accidental constitution is depressing reading. The maintenance of the arrangements existing when the capitulation of 1803 took place was neither internationally nor in constitutional law binding on the Crown, and it was by sheer neglect that the British government did not replace them by a more sensible system. Even in 1842 the Law Officers could only assert that taxation was ultra vires the Crown in Council, under the principle of *Campbell* v. *Hall* (1 Cowp. 204), decided in 1774, which ruled that, where the Crown had granted a representative legislature with powers to tax, it could not thereafter impose taxation without the authority of Parliament. The actual cession of 1814 was absolute, and the Crown should there and then have introduced an effective control. Its failure to do so was, however, wholly in keeping with the resolute disinclination of British governments to face difficulties, unless compelled by Parliament to do so. Naturally, with the passage of time, Secretaries of State were more and more reluctant to trouble themselves with the affairs of a minor colony, though at times they could assert their authority. It must be remembered also that the West Indian interest in the Commons was long powerful, and that Secretaries of State could not readily forget the trouble into which Lord Melbourne's adminis-

tration had fallen through its quarrels with the refractory Jamaican legislature.

There are some omissions; thus in the list of cases (p. 330) when Parliament might legislate, there is passed over the most important Act of all, that abolishing slavery, and the account of the Constitution does not deal with the maintenance and final extinction of the system of Roman Dutch law. The voluminous appendices do not include the new constitution; there is unfortunately no index, though the table of contents is detailed; and it is not clear why Sir John Pakington's name should throughout be wrongly spelt. But, though too one-sided to be a definite history, the book is to be welcomed as a very full and careful presentation of the official case.

A. BERRIEDALE KEITH.
University of Edinburgh.

Select Cases in the Court of King's Bench Under Edward I.—Vol. I. Edited for the Selden Society by G. O. Sayles. (Selden Society Publications, vol. 55). London. 1936. Pp. clxx, 222.—This is the most recent volume of the admirable series which bids fair to remove the reproach of indifference to historical research, justly brought against English and American lawyers. Of the Society in general and its labors, little need be said, except once more to call to the attention of all persons interested how fully it deserves general support. If we are ever to have an adequate presentation of the sources of our law, it will be chiefly through the Selden Society.

The new volume adds much of the highest value. It contains 119 pleas selected from the Coram Rege Rolls and running from 1272 to 1289, that is, from the accession of Edward I to well after the Statute of Westminster II and up to the purging of the Benches. The editor, Dr. Sayles, has already put historians under obligation in previous studies.

Besides the text of the pleas themselves and their translation on identically numbered pages, Dr. Sayles gives us an introduction which is itself a substantial treatise. There are five chapters of which the most important is the first, "The Evolution of the King's Bench Before 1272." In this chapter he advances the striking theory that the court Coram Rege, which became the King's Bench, was a separate court at the time of John, distinct both from the Common Bench and from the Council, and that later developments up to the period represented by these texts merely added precision and limitations to the jurisdiction and procedure of the court. He states in his notes at various places that he expects fully to establish his case by more detailed arguments in a succeeding volume.

Evidently we must await this discussion before we can appraise Dr. Sayles' theory adequately. I fear it must be said that he has not made out a case by what he presents so far. All the passages he cites are easily reconcilable with what may be called the received opinion—at any rate, the one which has been familiar learning since Pollock and Maitland's book. According to this opinion, the *curia regis*, the King's council in the narrower sense, continued to work as a whole or by special committees after the Bench came into full existence under Henry II. There is nothing strange in the fact that many cases might indifferently be treated by the king in his council wherever the king happened to be or sent to the Bench that sat more and more steadily at Westminster, until it became permanently settled there. Suitors would normally prefer the settled court to pursuing the king all over England and this fact ultimately created an exclusive jurisdiction for the settled court. And there is equally nothing strange in the fact that special "courts" for special occasions or group of occasions might be selected out of the council, but before we can take Dr. Sayles' venturesome thesis as established, we shall need clear proof that a small group of justices meeting with the king himself thought of themselves as continuous in personnel and determinate in function as early as he would have us believe.

It may be that we shall have to depend on terminology after all and decline to treat the King's Bench as a wholly distinct court until it actually calls itself a *bancus*, a "bench". This term, as a matter of fact, implied in medieval terminology a certain quasi-corporate definiteness in the persons who constitute it. It is used in contemporary documents on the Continent of the governing boards of guilds and towns as well as of judicial tribunals. As it is used in the texts of this volume, it really means a "session", and by extension, a group, rather than a physical bench or a table. When it was first applied to those men of the king's council who heard pleas with him in which his interests were concerned or which the Common Bench had not dealt with or had improperly dealt with, we cannot be sure. By the time of the pleas here published, the justices—generally two in number—who sit with the king and occasionally without him are quite decidedly a "bench". There is talk of "both benches" and the Bench *coram rege* is differentiated from the other *apud Westmonasterium*, which is called *magnus bancus*, in which *magnus* means "large" rather than "great".

The king may call others of his council to sit with the justices of the King's Bench and once in a grand assize he sets up a quite extraordinary and special tribunal (p. 84) when a judge of the Common Bench, a baron of the Exchequer, the Chancellor of the Exchequer and a judge of the King's Bench with other "faithful persons" are added together to make up a formidable body indeed. On several occasions the Benches sit together. It is clear that, although the King's Bench has an organization, a title and records of its own and its own officials, none the less it is still a body with somewhat hazy outlines and the king may prefer to consider with a large council or in his parliament what would normally be a matter for this court. A court which will admeasure dower, establish a rule of maritime law, correct errors, amerce an entire county court and punish trespasses that range from a near rebellion to a snowballing frolic is not a mere chamber of a systematized judiciary.

In one of his later chapters, Dr. Sayles brings much needed rectifications of Foss' "Lives of the Judges" for the period between 1269 and 1327. The lists, pp. cxxix-cxli, contain painstaking and precise tabulations by year and term of all the judges of Edward I and Edward II. A similarly careful study of the legal representatives and attorneys adds much to the book's value.

In a few instances, there are obvious slips in the text which may be those of the scribe, although they are not indicated as such by the hieratic symbol, "*sic*". I have noted *dilectibus* for *dilectis* (p. 27), *quendam* for *quandam* (p. 59). But on p. 46, the reading *regi* seems to be a slip of the editor. The archbishop could not possibly have addressed a letter of this sort to the king. I have no doubt that a renewed inspection of the manuscript will show *regi* to be a misreading or miswriting for *Roberto*, since at that time the redoubt-

able Robert de Insula (Halieland) was Bishop of Durham.

I find a number of difficulties with Dr. Sayles' method of translation. It is perhaps too late to object to the rendering of *iniuria* by "tort" and *inquisicio* by "inquisition" since other volumes in this series use this rendering, although "wrong" and "inquest" would, I think, be better and would avoid disturbing connotations. But I can see little reason for translating *velle* throughout by "want" instead of "wish." The former nearly always gives an awkward tone to the text. The tone of the translation, as a matter of fact, is curiously defective in other respects. One can hardly speak of the king's claim (*petitio*), p. 97, as a "petition" or translate *"valeant"* (p. 44) as "be worthy". Similar infelicities are to be found. One is particularly moved to wonder why the same term or word is sometimes differently rendered in almost successive lines of the same plea. Even the running title translates *coram rege* by "before the King's Bench", which is, to say the least, curious.

Actual errors of translation are not absent. *"Dedecus"* does not mean "disparagement" (p. 16) but "disgrace." "Disparagement" has an altogether different sense that recurs frequently in these very texts. Nor again, can *scandalium* (p. 29) be so translated instead of by the obvious equivalent "scandal" or "slander." *"Deforciavit"* (p. 23) does not mean "estopped". *Totum ius* (p. 89) means "the entire question," not "all right," and *in dilatoria* (*ibid.*) does not mean "for purposes of delay", but "in a dilatory plea", as is correctly rendered later on. "Her charters", on p. 104, is quite misleading because of the defective syntax of the entire sentence. *"Parentela"* is not "affinity"(p. 135)but "consanguinity" or "relationship". "Where" on p. 148, should be "that" and the punctuation changed, since otherwise the sentence makes no sense. On p. 160 "judgment against the argument" is meaningless. The obvious sense is "judgment whether the ancestors of the heiress were enfeoffed before the father of the heiress, in the same manner as he [was enfeoffed]."

Lapses of this sort do not appreciably impair the value of Dr. Sayles' edition. Nor may one complain of the inadequacy of the index. To prepare a really full index would be a task almost as extensive as that of writing the book itself.

The material gathered in these pleas is a fascinating medley in its variety and is important enough to demand serious modifications of many statements in treatises and handbooks. For one thing, the "law and custom of the realm" which we shall later know as the "common law" is still differentiated from the term "common law" itself, *communis lex*, which is a descriptive term and means the ordinary and usual practice as distinguished from any special right. Again the "law and custom" consists chiefly of procedure and a procedure technical and precise enough to make variations in the wording of writs fatal, and the omission of a phrase like "who is dead" a reason for dismissing a case. Precedent is known and a deference to the wisdom of judges and councillors who have framed a writ is a sufficient reason for accepting it. But the guiding principle of decision is after all equity and justice, unless a privilege is claimed by specific grant or particular custom. There is a "king's register of writs" which is preserved in the chancery and has almost an official character, a fact that confirms Maitland's view that the Register of Edward I's time was substantially the one that became permanent.

In regard to particular matters, there is a mention of three situations in which a woman may bring an appeal involving a capital sentence, although Magna Carta allows only one, Bracton only two, and it has been usual to refer to Richard II for a third instance. Specially important is the case involving the capacity of women to be on an inquest, which seems to involve their capacity to bear witness at all. This is the more extraordinary as the case is one of curtesy and the testimony is in regard to whether a new-born child was heard to cry out, a situation in which it is admitted masculine testimony would be hard to get. Other points in a growing theory of evidence is the fact that the judge's own knowledge dispenses with proof of the country (p. 112) and that the court recognizes and applies the mercantile rule of two witnesses in a proper case (p. 172). A great deal of material on the development of the jury and on the relation of the appeal to the indictment may be found here. In Pl. 28 (p. 36) we have the extraordinary defense to an appeal of robbery that the king whose peace was breached was the king at the time of the offense (Henry III) whereas the "King's peace" mentioned in the writ must be taken to be the "present king's" peace (i.e. Edward I). The defense was sufficient and the appellant was committed to gaol. Evidently the king's peace was not quite continuous even after 1272.

One of the most interesting of the cases is that which sets forth the royal position. The king is not bound by the writs of course but may modify them at pleasure (p. 54). Similarly he sovereignly interprets his charters in his own special court (p. 132). It is otherwise with his subjects. In a case before Westminster II it is stated that there are only three writs in chancery by which a right of patronage can be demanded and that a writ not falling into those three groups need not be answered (p. 22). And even after Westminster II—to be sure in Carmartheon (p. 174)—a writ must correspond in wording precisely to the form on file in the Chancery.

These are only some of the matters that should make this volume absorbing reading for a lawyer. The student of manners and customs will be equally rewarded. If Maitland thought it incomprehensible that men write the history of England without recourse to the Year-books, he might well have added such plea rolls as these.

Perhaps it will not be amiss to quote in full one plea which may well be called a model of concision and completeness (Pl. 22, p. 31) (Michaelmas, 1278)

"Isabella of Downham Hythe came forward on the fourth day against Robert Tirpel and William and serjeant on a plea of robbery and breach of the king's peace, whereof she appeals them. And they did not come. And the sheriff was ordered to attach them to be here on this day. And the sheriff sent word that they were dead etc. Therefore concerning these matters, nothing has been done."

It is to be hoped the sheriff was concealing nothing under his *et cetera*.

MAX RADIN.

University of California.

Leading Articles in Current Legal Periodicals

The summaries of certain articles which follow are presented for the purpose of calling attention to contributions which apparently contain material of practical interest to the profession. In case the reader desires a copy of any of the magazines in which the articles appear, he is asked to write the publication directly. He will find the address in the summary.

SALES

WHAT do the bulk sales laws mean when they are phrased so as to apply to dispositions and transfers which are (a) in bulk, and (b) "otherwise than in the ordinary course of trade;" what form must the disposition or transfer take in order to be within the scope of these laws? On some of the questions involved in this field certain fundamentally clear conclusions may be gathered from the authorities. For example, on the question of "ordinary course of trade," it appears that (1) the intention of the seller is not a material element in determining whether the disposition is out of the ordinary course of his business; (2) the fact that the sale or transfer was made to one who was not a member of the general class of buyers to whom the business customarily caters is a persuasive element in the case; (3) "The soundness of the business policy motivating the transaction unquestionably enters as an indefinable element in the determination whether the sale is out of the ordinary course of business." Likewise the majority view seems to be that the transfer in total or partial satisfaction of a debt constitutes a preferential transfer in violation of the bulk sales laws. On the inquiry of what constitutes a sale in "bulk," a number of jurisdictions have found their answer in such phrases as "substantially all" or the "major portion" or "substantially the entire business of the vendor;" while other jurisdictions have accorded the word bulk a slightly broader scope with such interpretative expressions as "large part" or "material portion" of the seller's stock. As to liquidating trusts, "the majority of cases have held that the transfer in trust for the benefit of creditors is not within the bulk sales laws for the reason that a general assignment has an effect which is consonant with the purposes of bulk sales legislation." The entire subject is discussed in an excellently organized and well annotated paper entitled *The Problem of Transfers Under Bulk Sales Laws: a Study of Absolute Transfers and Liquidating Trusts*, by Thomas Clifford Billig and William L. Branch, Jr., Michigan Law Review, March, 1937 (Ann Arbor, Mich.).

INSURANCE

"In cases involving insurance policies tried in the federal courts by reason of the diversity of citizenship of the parties, the problem frequently arises whether the state law as determined by the highest court of the state whose law governs by the principles of the Conflict of Laws is controlling or whether the federal court will determine for itself what the law is as a matter of 'general commercial law' or 'general jurisprudence.'" "The problem is of frequently recurring importance in insurance cases, especially in recent years because of the tremendous growth of the insurance business and because the federal courts hear a large proportion of litigated insurance cases." Several recent significant decisions of the United States Supreme Court and Circuit Courts of Appeals have gone far in limiting the application in insurance cases of the principle of *Swift v. Tyson* (16 Pet. 1) that "in matters of commercial law and general jurisprudence . . . the federal courts will exercise an independent judgment" as to the law. One writer has placed special emphasis on the recent case of *Mutual Life Insurance Co. v. Johnson* (293 U. S. 335) decided in 1934, in which the court found that the construction of a conventional total and permanent disability clause involved "the construction of a highly specialized condition," in which the federal courts should "yield to the judges of Virginia expounding a Virginia policy." "In the Johnson case the Court did not investigate the substantive question independently, the state court decisions being followed both because of the different meanings which could be given to the particular words in the policy and because of the split of authority in other states as to the interpretation of such language." "Since the court in the Johnson case did not investigate independently the merits of the substantive law question, but followed the state decsion, after pointing out that there was a dispute of authorities on the question, it is submitted that the expressions 'balanced with doubt,' and 'benign and prudent comity,' coupled with the statement, 'at least in cases of uncertainty we steer away from a collision between courts of state and nation when harmony can be obtained without sacrifice of ends of national importance,' indicate that the deleterious effect of *Swift v. Tyson* will be avoided in most insurance cases." The entire subject is well covered in *State Insurance Decisions in Diverse Citizenship Cases in Federal Courts*, by Claude H. Brown, Georgetown Law Journal, March, 1937 (Baltimore, Md.).

UNEMPLOYMENT INSURANCE

Few questions are more timely than those involved in the current activity dealing with unemplpoyment compensation legislation. The due process clause is, of course, a dominating issue. As to due process, "there are guide posts in the form of Supreme Court decisions in analogous situations, and any state legislature contemplating the enactment of a new law or amendment of an old law does well to keep them in mind." In connection also with the due process phase of the question an interesting argument has been raised by employers who "object to placing the burden of unemployment compensation directly upon employers, saying that employers 'as a class are not responsible for unemployment.'" In a recent article the general counsel of the Social Security Board has suggested adequate answers to this and other objections which have been raised against the Social Security Act. For example, against the objection above referred to, one answer is that "there are numerous instances where legislatures have allocated the costs of a necessary evil to a particular group out of whose activities the evil arises." The article also points out the foundations "for drawing a line between very small employers and larger employers, and for exempting the former from unemployment compensation laws." Although some question has been raised on the matter of the handling of funds as provided in the Act, the writer also points out that "in most state constitutions there are no obstacles to providing for paying over the funds to the Secretary of the Treasury." These and other points are clarified and amplified in a brief discussion entitled *Some Constitutional Aspects of State Unemployment Compensation Laws*, by Thomas H. Eliot, Washing University Law Quarterly, April, 1937(St. Louis, Mo.).

OFFICERS

"One of the most perplexing problems of administrative law, as of tort law also, concerns the individual liability for damages of public officers who, in the performance of official duties, commit errors causing injury to private personal or property rights." Thus reads the preface of a recent article which eloquently states the grave immediate importance of the general subject. "The multiplication of administrative authorities and mushroom expansion of their activities involve the inevitable tendency

of bureaucracy to reach out ever for more power, and offer temptations and opportunities for the play of the sadistic impulses and extreme addiction to technicalities so frequently noticeable in small men when placed suddenly in positions of authority and power, without the professional traditions behind them that in the case of judges have served as such a strong restraining influence. To the extent necessary to curb such tendencies the injection into administration of some lay influence through the medium of damage suits with their accompanying visitation of personal consequences upon the officer whose action is challenged, no doubt appears to many to be still worth preserving alongside the non-tortious forms of judicial control." Among the problems involved and included in the discussion are quasi-judicial administrative action, ministerial liability without fault, and the proposition that the question should be primarily one of reasonableness of official action. After concluding a thorough scientific study with the observation that the time has come for the development of a new approach to the law of official liability, the author attempts "to set forth and sufficiently elaborate in a series of six propositions a formulation for the law of official liability that is believed to be both adequate and free of objections inherent in the traditional approach." *Tort Liability of Administrative Officers,* by Edward G. Jennings, Minnesota Law Review, Feb., 1937 (Minneapolis, Minn.).

LABOR

Recent, and almost daily, developments have focused attention on the role of the law and its technique in the field of labor disputes. What is the proper function of the courts in such controversies, as affected by (1) the type of economic pressure exerted by labor; (2) the nature of the particular concessions desired by labor; (3) instigation of labor activities by so-called "outsiders" not directed by the particular employes to act for them; (4) the fact that the particular activity is directed toward a breach of some contract? In a recent article the author has attempted to indicate the paramount importance of considering the detailed fact situations underlying the field of labor disputes. A study of the authorities seems to indicate that "instead of examining the facts of the cases for fact differences which may justify or require varying legal results courts persist in employing vague, often meaningless, concepts as a basis of decision. . . . Thus many courts are prone to decide a case by giving the fact situation a name (e. g. 'secondary boycott') and then arriving at a result supposedly dictated by previous cases which had used the same name." This unrealistic dependence on invidious terminology recalls to the author Justice Holmes' reference to the "vocabulary of vague vituperation." "One cannot read many decisions on this subject without receiving the impression that the average court begins the consideration of a case with something akin to a prejudice in favor of the employer. . . . The most concrete manifestation of this attitude is the persistence of the 'prima facie' theory of tort applied in these cases—the theory that economic damage caused by labor activity is presumptively actionable, with the burden upon defendants to establish justification." The article referred to is well documented and a competent contribution to current revaluations in this field. *The Legality of "Peaceful Coercion" in Labor Disputes,* by Bernard Eskin, University of Pennsylvania Law Review, March, 1937 (Philadelphia, Pa.).

FEDERAL INTERPLEADER

"In states S-1, S-2 and S-3, respectively, A, B, and C seek to recover debts alleged to be due them from D. In their respective actions against D each of the three plaintiffs (A, B and C) garnishes the Garnishee Company, a corporation that is lawfully transacting business in states S-1, S-2 and S-3, and subject to suit in each." "The recent case of *Sanders v. Armour Fertilizer Works,* (292 U. S. 190) shows that in certain cases the Federal Interpleader Act makes possible a change in the position of a corporate garnishee. It is submitted that in certain cases a corporation that is a garnishee debtor may now exercise some control as to which of several competing garnishing creditors shall prevail. Its position is no longer that of a mere stakeholder. Moreover, in those cases, winning a race to priority of judgment may no longer be a matter of concern to the garnishing creditors themselves." "Under the Federal Interpleader Act the insurer could interplead the different claimants in one suit in the federal district court of the district in which one (or more) of the claimants resides. By payment of the amount involved into court or by giving a bond conditioned upon its compliance with the future order or decree of the court with respect to the subject matter of the controversy the insurer could obtain relief from double or multiple vexation." This very interesting and vital situation is illuminatingly discussed in *The Federal Interpleader Act and Conflict of Laws in Garnishment,* by Harold Wright Holt, the University of Chicago Law Review, April, 1937 (Chicago, Ill.).

TAXATION

Recent increases in federal income and estate taxes have increased the importance of "whether and to what extent a tax payer . . . may, in establishing a voluntary trust for the benefit of his immediate family, achieve the goal of reducing his federal income tax and, ultimately, his federal estate tax, and, at the same time, protect himself in the trust instrument from outside interference in the running of his business and in the general conduct of the trust." Certain guiding principles have already been made clear by the authorities. "The insertion of a provision reserving...the power to revest in the grantor title to any part of the trust property will result in the income of such part of the trust being taxable to the grantor." "Retaining such a right to determine who should enjoy the income after the death of the grantor will subject the trust property to the estate tax." "If under the terms of the trust the income may revert at any time to the grantor it will be taxable to the grantor." On the other hand, there are certain provisions described as not likely to subject the grantor to tax liability. "The trustee may be directed or authorized in his discretion to accumulate the income and to add it to the principal." "The grantor may constitute himself the sole trustee and may exercise all the powers which another trustee may exercise." Other valuable considerations occur in connection with the creation of a trust of a business. "No change in the tax status occurs . . . if the owner of the stock merely assigns the right to the dividends and retains ownership of the stock." "The partner may constitute himself trustee of his partnership interest or the part thereof for the benefit of himself and other beneficiaries." In a useful article the author has presented a clear picture of the possibilities within this field; other matters include the necessity of guarding against the effect of other federal tax laws such as the Gift Tax, and the Federal Corporation Tax. Another important question considered concerns the extent to which "Congress by changes in the statutory law and by applying them retroactively may constitutionally change the tax status of trust property or its income and thus nullify the benefits for which the trust was established." These and other valuable suggestions are discussed fully in *Voluntary Trusts and Federal Taxation,* by Coleman Silbert, Boston University Law Review, January, 1937 (Boston, Mass.).

MUNICIPAL LAW

The extension of national governmental activities has stimulated municipal financial programs involving the development of municipal ownership. This development "finds itself restricted by constitutional debt provisions inherited from the early period of economic expansion. The ensuing adaptations and adjustments which have been evolved to satisfy contemporary needs have been haphazard and without integration into a comprehensive program of muni-

cipal finance." Thus there has arisen the necessity for re-examining the foundations and defects of such arbitrary limitations on the permissible amounts of total indebtedness. "The fundamental difficulty with a debt limitation which is predicated upon a percentage of the assessed value of property is that it is lacking in proper economic foundation: there is no necessary relationship between the assessed value of property and a municipality's need for public improvements or its ability to finance such improvements." "The prevailing method of avoiding debt restrictions in the acquisition of needed public improvements has, however, been by means of the 'special obligation,' a type highly various in application yet falling within two general classifications: (a) a municipal obligation not payable from taxes but solely from the revenues of the improvement, usually a utility; and (b) a debt of a public corporation organized especially to provide for a municipal improvement—an 'authority' or a 'district'." "The distinctively modern special corporation differs from its predecessor principally in respect to method of financing; its obligations are payable solely from the revenues or property, or both, of a utility which it operates, no power to levy taxes or special assessments being available." The subject is well treated in its manifold aspects, with an annotated appendix classifying the States as to recognition of the Special Fund Doctrine with respect to municipal obligations, in *Municipal Improvements as Affected by Constitutional Debt Limitations*, by C. Dickerman Williams and Peter R. Nehemkis, Jr., Columbia Law Review, Feb., 1937 (New York, New York).

Brooklyn Law Review, March (Brooklyn, N. Y.)—Tampering with Marriage, by John S. Bradway; Statutory Injunctions Under the Federal Alcohol Administration Act, by Arthur A. Alexander; Labor Treaties and the Due Process Clause, by Abraham C. Weinfeld.

Canadian Bar Review, March (Ottawa, Ont.)—Restraining Breach of Contract, by W. F. O'Connor, K. C.; Legal Education in England, by Francis Vallat; Sir Edward Clarke, by Roy St. George Stubbs.

University of Chicago Law Review, April (Chicago)—Legal Education, by Robert Maynard Hutchins; Aspects of the Chandler Bill to Amend the Bankruptcy Act, by James Angell McLaughlin; The Federal Interpleader Act and Conflict of Laws in Garnishment, by Harold Wright Holt.

University of Cincinnati Law Review, March (Cincinnati, Ohio)—Report of the Cincinnati Conference on Trial by Jury.

Columbia Law Review, March (New York City)—On Warranty of Quality, and Society: II, by K. N. Llewellyn; The Moral Hazard Clauses of the Standard Fire Insurance Policy, by George W. Goble.

Columbia Law Review, April (New York City)—Reduction of Criminal Sentences on Appeal: I, by Livingston Hall; Municipal Home Rule in New York, by Joseph L. Weiner; Non-Competing Goods in Trademark Law, by John Wolff.

Commercial Law Journal, April (Chicago)—Essentials of Bankruptcy, by Garrard Glenn; Review and Comment in the Richmond Case, by William B. Layton; The Robinson-Patman Act, by Samuel Blumberg; "God Save This Honorable Court," by Charles E. Lane.

Dickinson Law Review, April (Carlisle, Pa.)—Life Insurance as Constituting Part of a Bankrupt's Estate in Pennsylvania, by J. Wesley Oler; The Present Status of Bailment Leases in Pennsylvania, by Albert M. Hankin; Apoplexy in Law, by Kurt Garve.

Georgetown Law Journal, March (Washington, D. C.)—Federal Rules of Civil Procedure: Some Problems Raised by the Preliminary Draft, by James Wm. Moore; Constitutional Principles and Jurisprudence, by Hessel E. Yntema; The Validity of Federal Loans and Grants to Municipalities for Construction of Power Plants, by Francis X. Welch; Proposed Revision of the National Bankrupt Act: Corporate Reorganization and Stockbrokers, by Garrard Glenn; State Insurance Decisions in Diverse Citizenship Cases in Federal Courts, by Claude H. Brown.

George Washington Law Review, March (Washington, D. C.)—The Evolution of the Interstate Commerce Act: 1887-1937, by Clyde B. Aitchison; Practice and Procedure Before the Interstate Commerce Commission, by Elmer A. Smith; The Interstate Commerce Commission and Congress—Its Influence on Legislation, by Hon. John J. Esch; Judicial Review of the Decisions of the Interstate Commerce Commission, by Martin Tollefson; The Doctrine of Precedents and the Interstate Commerce Commission, by William H. Pittman; The Interstate Commerce Commissioners: The First Fifty Years: 1887-1937, by Clarence A. Miller.

Harvard Law Review, March (Cambridge, Mass.)—Fifty Years of Torts, by Francis H. Bohlen; Fifty Years of Future Interest, by Lewis M. Simes.

Illinois Law Review, March (Chicago, Ill.)—The German System of Administrative Courts, by Rudolf E. Uhlman and Hans G. Rupp; Liquidated Damages in Illinois, by J. Rockefeller Prentice; The Selection of Judges for Cook County: The Chicago Bar Association Plan, by Henry A. Gardner, Harry M. Fisher and Edward M. Martin.

Indiana Law Journal, April (Indianapolis, Ind).—Was Coke Right? by Murray Seasongood; Indiana Municipal Revenue Bond Financing, by Adolph H. Zwerner; The Organization and Functions of County Boards in Indiana; by Clyde F. Snider.

Iowa Law Review, January (Iowa City, Iowa)—A Symposium on State Income Taxation by Robert C. Brown, Franz Martin Joseph, Ralph R. Neuhoff, Roy H. Palmer, Henry Rottschaefer and Roger John Traynor.

Kansas City Law Review, April (Kansas City, Mo.)—The Federal Judiciary: An Analysis of Proposed Revisions, by Lynn I. Perrigo; The Child Labor Problem, by Bruce R. Trimble; Uniform Rules of Procedure for the District Courts of the United States, by J. Hugo Grimm; Clark v. Austin: The Practice of Law by Laymen, by A. M. Meyer.

Kentucky Law Journal, March (Lexington, Ky.)—Fictitious Payees in Bills of Exchange; A Comparative Study, by Philip W. Thayer; The Development of Financing Public Improvements by Kentucky Municipalities, by George W. Meuth.

Maryland Law Review, February (Baltimore, Md.)—Charitable Trusts in Maryland, by Charles McHenry Howard; Mortgagee's Rights in the Event of a Deficiency, by Jesse Slingluff, Jr.

Michigan Law Review, March (Ann Arbor, Mich.)—The Patman Act in Practice, by Blackwell Smith; The Problem of Transfers Under Bulk Sales Laws: A Study of Absolute Transfers and Liquidating Trusts, by Thomas Clifford Billig and William L. Branch, Jr.; Curbing the Supreme Court—State Experiences and Federal Proposals, by Katherine B. Fite and Louis Baruch Rubinstein.

Michigan Law Review, April (Ann Arbor, Mich.)—Basic Monetary Conceptions in Law, by Arthur Nussbaum; Gratuitous Promises—A New Writ? by Warren L. Shattuck; The Doctrine of Stare Decisis in British Courts of Last Resort, by John A. Fairlie.

Minnesota Law Review, March (Minneapolis, Minn.)—Cumulative Voting at Elections of Directors of Corporations, by Harlowe E. Bowes and Ledlie A. DeBow; Reciprocal and Retaliatory Legislation in American States, by Joseph R. Starr; Knowledge or Belief as a Prerequisite to Condonation in the Law of Divorce, by Eugene R. Reader.

Minnesota Law Review, April (Minneapolis, Minn.)—The Federal Judiciary: An Analysis of Proposed Revisions, by Lynn I. Perrigo; What Can an Riparian Proprietor Do? by Stanley V. Kinyon; Quasi Contractual Recovery in the Law of Sales, by Arthur Anderson.

Mississippi Law Journal, February (University, Miss.)—Safeguarding the People's Savings—A Challenge

to the Law, by Orvill C. Snyder; Negotiability of Promissory Notes Payable in Specifics, by Maurice S. Culp; The Insurance Contract—Should a Duty to Read Be Imposed on the Insured? by O. B. Triplett, Jr.; Government and Progress in the South, by A. B. Butts; Legal Status and Classification of Municipalities in Mississippi by Willam Hemingway; Unemployment Compensation, by Leon L. Wheeless.

North Carolina Law Review, April (Chapel Hill, N. C.)—Limitations on Investigating Officers, by Albert Coates; Outline of the Gold Clause Cases, by Angus D. MacLean; The Defaulting Plaintiff in North Carolina, by John E. Mulder.

Notre Dame Lawyer, March (Notre Dame, Ind.)—Justice, by Rev. John F. O'Hara, C.S.C.; The Judge and Lawyers: Their Duties, by John I. O'Phelan; Statutory Definitions of Public Utilities and Carriers, by Jacob Geffs.

University of Pennsylvania Law Review, April (Philadelphia, Pa.)—Rationale of a Criminal Code, by Albert J. Harno; A Reconsideration of the Hearsay Rule and Admissions, by John S. Strahorn, Jr.; Torrens Titles and Title Insurance, by Edward H. Cushman.

Philippine Law Journal, March (Manila, P. I.)—Present Tendency in the Law of Moral Damages in the Philippines, by Adolfo T. Reyes; The Doctrine of Stare Decisis and the Supreme Court of the Philippine Islands, by Emiliano M. Lazaro.

University of Pittsburgh Law Review, February (Pittsburgh, Pa.)—Estoppel to Assert an After-Acquired Title in Pennsylvania, by J. John Lawler; The Mental Element in a Criminal Attempt, by Robert H. Skilton.

Tennessee Law Review, April (Knoxville, Tenn.)—Sections 74 and 77B of the Bankruptcy Act and the Security of a Conditional Vendor, by William G. Brown; Denial of Equitable Relief Upon Failure to Prove Charge of Fraud, by Thomas H. Malone; Patent Clauses in Sales Contracts, by Robert E. Sadtler.

Tulane Law Review, April (New Orleans, La.)—Economic Duress and the Fair Exchange in French and German Law, by John P. Dawson; The Myth of the Innocent Spouse, by John S. Bradway; General Principles of Succession on Death in Civil Law, by Harriet Spiller Daggett; Trends in the Theory of Contracts in the United States, by George W. Goble.

Virginia Law Review, March (Charlottesville, Va.)—An Appraisal of Some Phases of the Corporate Reorganization Statutes, by James B. Alley; The Duke of Norfolk's Case, by Herbert Barry.

Virginia Law Review, April (Charlottesville, Va.)—Is the Amended Federal Reserve Act Constitutional?—A Study in the Delegation of Power, by David McC. Wright; An Appraisal of Some Phases of the Corporate Reorganization Statutes, by James B. Alley.

Washington University Law Quarterly, April (St. Louis, Mo.)—Significant Trends in Modern Incorporation Statutes, by Wiley B. Rutledge, Jr.; Some Constitutional Aspects of State Unemployment Compensation Laws, by Thomas H. Eliot; Tort Liability of Suppliers of Electricity, by Lester W. Feezer; Crime Control as an Interstate Problem, by Justin Miller.

Wisconsin Law Review, February (Madison, Wis.)—The Power of the Contracting Parties to Alter a Contract for Rendering Performance to a Third Person, by William H. Page; Can Canada Ratify International Labor Conventions?—A Problem of the Division of Power Between Central-State and Member-States in a Federal Union, by William Gorham Rice, Jr.; Compensation of Occupational Diseases from a Legal Viewpoint, by William W. Rabinovitz.

Yale Law Journal, March (New Haven, Conn.)—The Trustee and the Trust Indenture: A Further Study, by Louis S. Posner; Maitland Reissued, by W. S. Holdsworth.

Yale Law Journal, April (New Haven, Conn.)—The Interstate Commerce Commission: An Appraisal, by I. L. Sharfman; Innovations in Public Utility Accounting Regulation, by E. W. Morehouse.

American Journal of International Law, April (Washington, D. C.)—The Inter-American Conference for the Maintenance of Peace, by Charles G. Fenwick; International Law and the Spanish Civil War, by Norman J. Padelford; The Problem of Aggression and the Prevention of War, by L. Kopelmanas; Neutrality Laws of the United States, by Edward Dumbauld; International Law in Treaties of the United States, by Robert R. Wilson.

Boston University Law Review, April (Boston, Mass.)—The Constitution and the Embattled Court, by George R. Farnum; Domicile in Marriage Law, by Blanche Crozier; Adultery: A Review, by Winfield E. Ohlson; Double Jeopardy in Massachusetts, by Edward M. Dangel; The Supreme Court and the Unwritten Law, by Edward A. Harriman.

California Law Review, May (Berkeley, Cal.)—Reorganization of the Supreme Court, by D. O. McGovney; Joint Torts and Several Liability, by William L. Prosser; State Jurisdiction to Tax Income from Foreign Land, by Arthur L. Harding.

Southern California Law Review (Los Angeles, Cal.)—Unemployment Insurance and Workmen's Compensation, by James A. Pike; Land Burdens in California: Equitable Land Burdens, by William Edward Burby; Appeals in Bankruptcy Cases, by Reuben G. Hunt.

Canadian Bar Rieview, April (Ottawa, Ont.)—Conflict of Laws: Examples of Characterization, by John D. Falconbridge; The Judiciary and Administrative Law in Australia, by Hon. Mr. Justice H. V. Evatt; The Labour Injunction in Canada: A Caveat, by Bora Laskin.

Commercial Law Journal, May (Chicago)—The Doctrine of Consideration, by Charles Newton Hulvey; Appeals from the District Courts to the Circuit Courts of Appeals in Bankruptcy Cases, by Reuben G. Hunt; Supreme Court of Missouri Deals with Unauthorized Cases, by Harry S. Gleick; Recent Trends at the Bar, by Herbert U. Feibelman; Selection of Judges, by Abraham S. Guterman.

Cornell Law Quarterly, April (Ithaca, N. Y.)—The Incidence of Judicial Control Over Congress, by Henry W. Edgerton; The "Jurisdictional Fact" Theory and Administrative Finality: (1), by Forrest R. Black.

The Journal of Criminal Law and Criminology, including the American Journal of Police Science, March-April (Chicago)—Criminological Research in Germany, by Nathaniel Cantor; The New Penology, by Thomas E. Murphy; English Ecology and Criminology, by Yale Levin and Alfred Lindesmith; Criminal Responsibility, by Paul C. Squires; Criminal Guilt, by J. J. M. Scanderett; Jewish Delinquency, by Liebmann Hersch; Handwriting Evidence Against Hauptmann, by Clark Sellers; Rifling Depth Micrometer, by C. M. Wilson; Police Service Rating Scale, by Spencer D. Paratt.

Harvard Law Review, May (Cambridge, Mass.)—Notabilia of American Civil Procedure—1887-1937, by Robert Wyness Millar; A Half Century of Legal Influence Upon the Development of Collective Bargaining, by Calvert Magruder.

Illinois Law Review, April (Chicago)—The Illinois Taxpayer's "Day in Court"; by Homer F. Carey and Daniel M. Schuyler; The German System of Administrative Courts, by Rudolf E. Uhlman and Hans G. Rupp; Administration of Minor Justice in Selected Illinois Counties, by H. K. Allen.

Iowa Law Review, March (Iowa City, Ia.)—Alienability and Perpetuities, by Percy Bordwell; Administrative Determinations and Full Faith and Credit, by Albert S. Abel; Sleeping at the Wheel, by John A. Appleman.

THE FORENSIC VALUE OF BLOOD TESTS IN EVIDENCE: A REVIEW

Despite Vigorous Support Offered by Distinguished Scientists and Legal Analysts as to the Value of Blood Tests in Evidence the American Bar Remains Apathetic—Scientific Authority on the Subject—Legal Significance of Such Tests—Attitude of European Courts—Not until 1933 Did Any Anglo-American Court Apply Its Logic to the Value of the Tests—First Statutory Step to Permit Their Introduction in Evidence Taken in New York, etc.

By William Louis Flacks, Ph.B., J.D.
Member of the Chicago, Illinois, Bar

MUCH has been written in the last few years on the subject of blood tests in evidence.[1] Despite the vigorous support offered by distinguished scientists and legal analysts, the American Bar still remains apathetic, leaving questions of disputed parentage to be resolved under antiquated unscientific rules with their attendant pitfalls.[2] It is the purpose of this review to call the attention of the various Bar Associations to the forensic value of blood tests in evidence, so that they may introduce, through their committees on amendments to the law, proper statutory measures.

The proponents of this pathological discovery say, in brief, that they have a fool-proof method whereby an alleged parentage may be positively disproven, if the conditions are favorable. They in no wise claim that given the blood of a child, its mother and its alleged father, they can affirmatively indicate the latter as the true father, such assertion being as yet beyond the possibilities of proof. But, given specimens of blood, the test may disclose the impossibility of paternity as regards such alleged father. In that event, scientific authority insists that the proof is absolute.

Scientific Authority

How authoritative is this test? A thorough examination of the medical data available since 1910 discloses such an unusual unanimity of opinion among all the leading pathologists, physicians and medical professors, that to the lay reader their assertions become fact.[3] The list is illustrious and impressive: Landsteiner, Von Dungern, Hirschfeld, Bernstein, Wiener, Lattes, Schiff, Epstein, Ottenberg, Buchanan, Hooker, Boyd, Lederer, Polayes, Springer, Thomsen, Snyder, Furuhata, Vuori, Vaisberg, Rothberg, Fox, Levine, and many others.[4] Each of these scientists is preeminent in his field, the first a recipient of the Nobel prize[5] for his work in this very regard, and all are in accord on these propositions, namely:

1. That human blood falls into well defined blood groups; each with its distinctive characteristics;[6]

2. That these blood characteristics are permanent, present in the foetus, lingering within the tissues long after death, and appear in practically every composition and secretion of the human body;[7]

3. That these blood characteristics are predominantly inheritable in an immutable chain from parent to child;[8]

4. That the blood of the child can contain only such elements as were present in its parents, and if any element is absent in both of its parents it is physically impossible that it be present in the child;[9]

5. That if the child's blood is the correct group for the alleged parents, then the child could

1. 1933: 7 St. John's Law Rev. 233; 8 St. John's Law Rev. 79. 1934: 43 Yale Law Journ. 651; 82 Univ. of Pa. Law Rev. 634; 9 Wisc. Law Rev. 314; 9 Iowa Law Rev. 625; 32 Mich. Law Rev. 987; 1 Univ. of Chicago Law Rev. 792; 25 Journ. Crim. Law & Criminology 121, 187; 9 St. John's Law Rev. 102; J. H. Wigmore, Evidence, 1934 Supp. Sec. 165a and b. 1935: 20 Cornell Law Qt. 232; 21 Am. Bar Ass'n Journ. 680; 94 New York Law Jour. 1542. 1936: 6 Detroit Law Rev. 101; 59 New Jersey Law Journ. 105; Am. Scholar, (March) 216; 2 Ohio State Law Journ. 203; 11 Temple L. Q. 79.

2. J. H. Wigmore, Evidence, Sec. 166, describing the "introduction" of the child into evidence in order to determine paternity by resemblance.

3. For comprehensive citations to the medical data, see A. S. Weiner, 186 Am. Journ. Med. Sci. 257 (1933); Philip Levine, 20 Journ. of Lab. & Clin. Med. 785 (1935); S. B. Hooker & Wm. C. Boyd, 25 Journ. Crim. Law & Crim. 187 (1934).

4. It has been estimated that some 200 articles have been written in the various medical journals on this subject.

5. Karl Landsteiner, Nobel Prize, Medicine, 1930.

6. Two substances, designated A and B, have been discovered in human blood which permit typing of blood into four major groups, vis. A, B, AB and O, depending on whether either, both, or neither of these substances are present in the individual. Two properties, designated M and N were later discovered, which permitted typing on the basis of 16 groups depending similarly on the presence or absence of either, both, or neither of the two properties. A. S. Weiner, 186 Am. Journ. Med. Sci. 257 (1933). See tables, Appendix, post.

7. For an interesting article on the stability of blood groups, see, Swetlow, Polayes, Weiner and Lederer, "Symposium on the Forensic Value of Tests for Blood Grouping," Medical Times & L. I. Med. Journal, July 1932, p. 203.

8. H. A. Epstein and R. Ottenberg, 8 Proc. N. Y. Path. Soc. 187 (1908); K. Landsteiner and P. Levine, 47 Journ. Exper. Med. 757 (1928).

9. The converse to this does not, however, hold true, since it has been established that, while a child can inherit from its parents only such elements as are present in the blood of its parents, it is possible that it inherit none or less than all of the elements that appear in its parents' blood. See table I, Appendix, post.

be their offspring, not that it must of necessity be; but on the other hand, if the child's group is wrong for the two asserted parents, then one may say with absolute certainty that the child must have a parent other than one of those asserted.[10]

Perhaps in the statement of these propositions the writer overlooks minor variations and formulations over which the medical world has battled and eventually ironed out,[11] but substantially these are the rules. For the convenience of the medical world, intricate tables and formulae have been worked out which enable conclusions to be determined with precision and economy of time. Time and again they have been proffered to courts of law to support the forensic availability of these tests. Suffice it to say that from these tables, even we, the laymen, once given by blood experts the characteristics of the blood of the parties involved, can readily determine the results. Two of the more important charts are appended below.[12]

Legal Aspects

It would be well at this point to stress the full legal significance of these tests. From the foregoing, it is apparent that their sole value lies in exclusion. The test, if positive in result, is affirmative proof excluding a possible parent and as such should be admissible. If negative in result the test simply indicates that the party examined could have been the parent and no more. Such an assertion obviously has no probative value whatsoever, since any of the millions who fall in the same blood classification could have been the parent as well. Consequently these negative results must be discarded and rigidly excluded from evidence as being valueless and prejudicial. It would be a precarious gamble to an accused if after submitting to a test on the strength of his innocence it appears that he falls within the same blood group as does the true father, and the same is shown to the average jury. The test, being one-sided, can be admissible only where positive, and where so, it is highly unreasonable to deprive an accused of its protection.

The legal problems involved in the admission of these tests into evidence have been widely discussed. Their admission without benefit of statute has been consistently urged by the majority of the writers as being an incidental power of the judiciary in compelling testimony where not self-incriminatory.[13] Their admission has been urged as a matter of real evidence over which the courts have always exercised power of compulsion.[14] The writer has urged their admission as matter of expert testimony[15] coupled with the recognized power of the court to compel a party or witness to submit to reasonable examination of his person when highly relevant to matters in issue.[16] In any event, the consensus of opinion appears to be that there is ample power in the court to order the parties to submit to a blood test, provided the result of the test, by way of exclusion, is material or relevant. In addition, the question of self-incrimination becomes negligible since it is generally agreed that the plaintiff, claimant, or complaining witness have no cause to raise such issue,[17] while the defendant loses nothing by taking the test, provided its one-sided nature is strictly observed.

Despite their one-sided nature, these tests can be quite extensively used. In those criminal cases, viz.: murder, robbery, assault, rape, arson, and kidnaping, wheresoever blood or other human materia is present in connection with the crime, such as blood stains, semen, sputum, bone marrow, etc., tests may be applied towards identification, and the same methods of exclusion adopted. A party accused who is actually innocent, would welcome a comparison of his blood with such blood or materia as may appear at the scene of the crime in order to benefit by the exclusion if it so results. In civil cases there is a wider latitude, notwithstanding their primary use appears to center about the illegitimate child in quasi-criminal bastardy cases. The tests can be shown similarly indispensable in excluding claimants to estates whose blood reveals conflicting data. Likewise, in divorce proceedings charging adultery, annulments, and alimony cases involving support of children, their use for exclusion purposes is evident.[18]

Forensic Application

The European courts seized upon this scientific method shortly after its announcement. In fact, even before the medical world was in accord on its application, the continental courts were utilizing its basic principles and developing their method contemporaneously with medical research.[19] Yet not until a few years ago did any Anglo-American court try the formula. The earliest record is of its use in Ireland in 1932,[20] and not until 1933 did any

10. R. Ottenberg, 6 Journ. of Immunol. 363, (1921); A. S. Weiner, 24 Journ. of Immunol. 443 (1933); K. Landsteiner and P. Levine, 47 Journ. Exp. Med. 757, (1928).

11. The peculiar nature of the "universal donor" and the "universal recipient" are matters of technical interpretation, although the tables prepared on the basis of these conclusions, are self-explanatory. See Appendix, post.

12. See Appendix. For an interpretation of these charts together with charts illustrating other aspects of blood tests, see A. S. Weiner, 186 Am. Journ. Med. Sci. 257 (1933); P. Levine, 20 Journ. Lab. & Clinical Med. 785 (1935); A. S. Weiner, "Blood Groups & Blood Transfusions" (Springfield, 1935); H. S. Hyman & L. H. Snyder, 2 Ohio State Law Journ. 203 (1936); W. L. Flacks, 21 Am. Bar Ass'n Journ. 680 (1935); J. H. Wigmore, Evidence, Supp. 1934, Sec. 165a.

13. See the excellent and thoroughgoing article by Milton I. Vogelhut of the Baltimore Bar, "Forensic Applications and Evidential Value of the Blood Group Tests," 6 Detroit Law Rev. 101 (1936). Cf J. H. Wigmore, Evidence, Supp. 1934, Sec. 165a, 165b.

14. Blewitt Lee, 12 Am. Bar Ass'n Journ. 441 (1926) approved by Mr. Vogelhut, supra note 13.

15. W. L. Flacks, "Evidential Value of Blood Tests," 1 Univ. of Chicago Law Rev. 796, (1934), "Evidential Value of Blood Tests to Prove Non-Paternity," 21 Am. Bar Ass'n Journ. 680 (1935), Cf. 43 Yale Law Journ. 651 (1934).

16. J. H. Wigmore, Evidence, Secs. 2217, 2220 (complete citations, Note 13). The late Professor E. W. Hinton of the University of Chicago Law School, took the position that if the defendant managed to procure a blood test without order of court and the test resulted in his exclusion, he could offer same in evidence through medical experts, and rejection of same would be reversible error. See cases note 24, below.

17. J. H. Wigmore, Evidence, Secs. 2190, 2194. U. S. vs. Mullaney, 32 Fed. 370 (1887); State vs. Pucca, 55 Atl. 831 (Del. 1903).

18. Cf. Classifications made by Lederer in the symposium appearing in Med. Times & L. I. Med. Journ. July 1932 p. 203.

19. "L'Individualite del sanque, etc.," by Prof. Lattes (Messina 1923); A. S. Weiner, 21 Journ. of Immunol. 157 (1931).

20. Reported in 66 Irish Law Times, 64 (1932) and 66 Irish Law Times, 111 (1932). Both cases are lower court decisions. In the first case the defendant was convicted but secured a new trial on appeal to the Dublin Circuit Court which allowed the use of the test, and the results of same excluded the defendant as the father. In the second case, the test proved negative, and a new trial was denied.

of the higher courts of record in England or in America apply their logic and reasoning to the value of these tests. While the hospitals and social laboratories throughout both countries were applying the tests in all manner of cases with gratifying results,[21] rare was the lawyer defending in court of law who dared to demand the protection and benefit of this gift of science for his client. Late in 1933 the South Dakota Supreme Court focused the attention of the legal world upon itself by passing on the admissibility of such tests in a bastardy case—and rejecting it.[22] A storm of criticism and controversy immediately arose; since then many courts in other states have been faced with the same problem. Strangely enough, at this writing, no other court of last resort has passed on this mooted question, although many inferior courts have in one way or another reached a decision.[23] It is significant that lower courts in New York, Pennsylvania, Maryland, Ohio, Illinois and Connecticut have since permitted the use of these tests in various cases on one ground or another without the aid of statute.[24] It is the writer's opinion that the decision of the South Dakota Supreme Court was more the result of inadequate argument on the part of counsel than prejudice against novelty on the part of the court.

The first statutory step was taken in New York. In 1935 the Criminal Code and the Civil Practice Act were amended to permit the introduction of these tests into evidence and requiring their use in certain cases.[25] This same act was modified in 1936 to conform with scientific principle and limiting the introduction into evidence of only such results as show positive exclusion.[26] Wisconsin followed with a similar statute late in 1935;[27] and a bill is now pending in Texas to like effect, with decided efforts being made in the same direction in Massachusetts, Michigan, Maryland and Illinois. Model acts based on the New York and Wisconsin legislation are herewith appended and submitted for approval to the State Bar Committees on Amendments to the Law.

On the whole, the proof of the pudding, so it is said, lies in the eating, and the medical world would welcome the use of this test by the judiciary. The exclusionary result of a single test vindicating an accused or destroying a fabricated claim would, at a stroke, convince the most skeptical authority in that jurisdiction.

APPENDIX

CHARTS

I—Heredity of the Landsteiner Blood Groups (Bernstein) (1925)—International Classification.

Matings	Children Possible	Children Impossible
O x O	O	A, B, AB
O x A	O, A	B, AB
O x B	O, B	A, AB
A x A	O, A	B, AB
A x B	O, A, B, AB	None
B x B	O, B	A, AB
O x AB	A, B	O, AB
A x AB	A, B, AB	O
B x AB	A, B, AB	O
AB x AB	A, B, AB	O

[From: A. S. Weiner, 186 Am. Journ. Med. Sci. 257 (1933)]

II—Heredity of the Landsteiner-Levine Blood Types (1928).

Matings	Children Possible	Children Impossible
M x M	M	MN, N
N x N	N	MN, M
M x N	MN	M, N
M x MN	M, MN	N
N x MN	N, MN	M
MN x MN	M, N, MN	None

[From: P. Levine, 20 Jour. Lab. & Clinical Med. 785 (1935)]

(*Continued on page* 475)

21. A. S. Weiner, 186 Am. Journ. Med. Sci. 257 (1933).

22. State vs. Damm, 257 N. W. 7 (S D 1933) Prosecution for rape; refusal to order blood test to determine nonpaternity of the accused with respect to the child born to prosecutrix, *held*, not an abuse of discretion in that "it does not appear from the medical record in this case that medical science is agreed" upon the propositions asserted in its favor Rehearing, 266 N. W. 667 (1936). The high court reaffirmed its former decision, but admitted that the test can be used as an invaluable aid in determination of cases of this type. The opinion is a splendid and learned discussion of the subject.

23. Exclusive of the South Dakota decision, there are about fifty lower court cases, either on record or reported by participants thereto. See note 24, below.

24. New York: Bueschel vs. Manowitz, 271 N. Y. S. 277, 151 Miscl. 899 (1934); (bastardy), order granting test reversed by Appellate Division, 241 App. Div. 888, 272 N. Y. S. 165 (1934), leave to appeal denied, 265 N. Y. 509 (1934); remedied by statute, see note 25 below.

Pennsylvania: Comm. vs. Zamorelli, 17 D. & C. 229 (1931), (bastardy) result of tests taken out of court submitted by defendant, jury disagreed on value of evidence and convicted defendant; reversed by county court and new trial granted in view of uncontrovertible expert testimony showing verdict not supported by evidence. Comm. vs. Visocki, 23 D. & C. 103 (1935) (bastardy) defendant similarly offered result of test showing exclusion, same admitted and defendant acquitted. See Comm. vs. Morris, 22 D. & C. 111 (1934), (bastardy) where defendant asked for order to take test and same was denied and sustained by county court on the ground that such order would be unenforceable. Cf. Comm. vs. English, 186 Atl. 298, (1936), (Superior Court).

Maryland: Case reported by Mr. Vogelhut in 6 Detroit Law Rev. 101 (1936) before Judge Stanton of the Supreme Bench of Baltimore City. Tests ordered and blood groups determined by Dr. Guttmacher (Daily Record, June 30, 1934). Mr. Vogelhut mentions in passing that 24 such determinations have since been made at the request of the courts of Baltimore City.

Ohio: Cases reported by Hyman & Snyder in 2 Ohio State Law Journ. 203 (1936) in various lower courts since February, 1934. Tests were allowed in each, proving positive in two instances. See, State vs. Welling, 6 Ohio Opinions 371 (1936).

Illinois: Case participated in by the writer, Blum vs. Blum (divorce) before Judge Allegretti of the Superior Court of Cook County, 1936. Test ordered and received in evidence. Being negative, nothing could be established. Two other instances of its use have arisen in the Superior Court, but in both cases the results proved negative and were of no value.

Connecticut: Cases reported by Dr. A. S. Weiner in 196 Am. Journ. Med. Sci. 257 (1938) in The Common Pleas Court of New Haven. The test proved positive in one case and operated to acquit the defendant.

25. March 22, 1935. Chaps. 196, 197, 198, Laws of 1935, amending the Inferior Criminal Courts Act, the Civil Practice Act, and the Domestic Relations Act.

26. May 4, 1936. Chaps. 439, 430, Laws of 1936. Cases arising under these statutes are illustrative of the effectiveness of blood tests in evidence. In re Swahn's Will, 158 Miscl. 17, 285 N. Y. S. 234 (1936), test employed to determine validity of alleged heirship. In re Lentz, 283 N. Y. S. 749 (1935) test allowed in a bastardy prosecution. In Flippen vs. Meinhold, 156 Miscl. 451, 282 N. Y. S. 444 (1935) (for support of child) where plaintiff sought to prove that the defendant was the father of the child by use of this test, the court properly denied the use since such proof is impossible. In Baxter vs. Baxter, 283 N. Y. S. 657 (1936) (not reported in the permanent volumes), (for support of child), the Domestic Relations Court of New York City held itself bound by statutory presumption that a child born in wedlock is legitimate and refused to grant the blood test. See, A. S. Weiner "Blood Tests in N. Y. Courts," U. S. Law Rev. (Dec. 1936).

27. Aug. 12, 1935 Wisconsin Laws 1935, Chap. 351.

MODEL STATUTES

I.

Blood Tests in Civil Cases. Wherever it shall be relevant to the prosecution or defense of an action, the court, by order, shall direct any party to the action, and the child of any such party, and any person involved in the controversy, to submit to one or more blood grouping tests, the specimens for the purpose to be collected, and the tests to be made by duly qualified physicians and under such restrictions and directions as the court shall deem proper. Whenever such test is proper and made, the results thereof shall be receivable in evidence, but only where definite exclusion is established. The order for such blood grouping tests may also direct that the testimony of such experts and the persons so examined may be taken by deposition.

II.

Blood Tests in Illegitimacy Cases. The court on motion of defendant, shall order the mother, the child and the defendant to submit to one or more blood groupng tests by duly qualified physician to determine whether or not the defendant can be excluded as being the father of the child, and the results of such tests may be received in evidence, but only in such cases where definite exclusion is established.

III.

Blood Tests in Criminal Cases. In any criminal case involving the possibility of identification on the basis of human blood, the court on motion of the prosecution or defense shall order the making of one or more blood grouping tests of the defendant's blood by duly qualified physician, and the results thereof shall be receivable in evidence, but only where definite exclusion is established. Whenever the court orders such blood tests to be taken, and the defendant shall refuse to submt to such test, such fact shall be disclosed upon trial unless good cause is shown to the contrary.

The Supreme Court and the President's Proposal

(*Continued from page* 424)

with an enlarged court, but it is less likely to arise, and we are now faced with this actual fact, which endangers much New Deal legislation. From this danger the proposal offers an escape, at least temporarily.

We cannot go on indefinitely with four out of nine justices adamantly opposed to every idea which was not current a generation ago. We cannot breathlessly each Monday make our whole economy mark time until we learn where Mr. Justice Roberts or some other justice stands. We cannot plan and enact into law an intelligent far-reaching program such as the situation demands and the people have called for.

The masses of the people who now suffer from adverse economic conditions will hold their government responsible. If their government is prevented from being used to remedy those conditions, and it makes no difference who is responsible for preventing it, the end will be the same as it has been in other countries. Our present capitalistic system will be changed somehow, and our democratic form of government will probably be changed too. In other words, recovery from the depression, which we have experienced, does not mean recovery from the causes which brought on the depression. As the President said in a recent message, "The overwhelming majority of this nation has little patience with that small minority which vociferates today that prosperity has returned, that wages are good, that crop prices are high and that Government should take a holiday."

The causes which brought on the depression have not been removed and they must be removed if another depression with even more serious consequences is to be avoided. There are three possible courses open to us. First, to do nothing. This in my opinion will prove fatal to our existing institutions. Second, to amend the Constitution. This, I believe, to be both unnecessary and entirely impractical. Third, to make such changes in the Supreme Court as may be made within the Constitution. Let us act in the best way open to us! That way I am convinced is the way the President has proposed.

Washington, D. C., May 27, 1937.

The Reception by the Courts of the Restatement of Trusts

(*Continued from page* 447)

the court in a recent case in Arizona.[51] In that case a husband and wife purchased land for $2,750, the husband paying $500 and the wife paying the balance. At their request the land was conveyed by the vendor to the wife. The wife died and the husband sought to enforce a resulting trust as to two-elevenths of the land. It was contended by the husband that there was an agreement between him and his wife that he was to be reimbursed for the amount which he advanced. The court held that whether or not he could enforce a claim for $500 against his wife's estate, at any rate no resulting trust arose since it was intended that the wife should have the whole beneficial interest in the land.

CONCLUSION

In this brief summary I have not attempted to cite all of the cases in which the courts have referred to the Restatement of Trusts; nor have I attempted to deal with the cases in which the courts have applied rules stated in the Restatement but without making reference to it. I have tried to show in a general way how the Restatement of Trusts has been received by the courts, and to what extent the courts have relied upon the rules stated therein. From an examination of the cases I think that it is safe to say that the influence of the Restatement on the decisions of the courts is increasing and is likely to increase in the future.

51. Armstrong v. Blalack, 52 P. (2d) 1183 (Ariz., 1935).

American Law Institute Holds Annual Meeting

(*Continued from page* 439)

that a well done state annotation is the greatest single help in an understanding use of the Restatement in the practical day to day problems involved in the presentation of cases and their decision by courts. The individual lawyers and committees who are assisting in this very important work are rendering a contribution to public service in the law, the value of which cannot be overstated. . . .

"In the meantime, the Institute will give such help to annotators as it can. Announcement has been made of the compilation of the list of Trusts citations available for those who undertake work in this field. One of the annotators tells us that not only has he found the citation list helpful, and that it has reduced by nearly one-half the period for the completion of his work. In the other subjects we cannot give as complete assistance as we can in Trusts, but we are glad to turn over to annotators the Reporter's list of citations whenever we have them. Professor Williston will give advice to annotators as their work progresses on matters of both substance and form and the publication of the material is the responsibility of the Institute and the American Law Institute Publishers. The annotator or his committee are relieved of both the financial and professional responsibility therefor.

"Our annotations list is in an encouraging condition. Property annotations are under way in Alabama, Arkansas, California, Kansas, Maryland, Minnesota, Mississippi, New Hampshire, Oklahoma, Pennsylvania, Tennessee, Texas, Washington, West Virginia.

"Trusts annotations are under way in Alabama, Arkansas, California, Colorado, Connecticut, Illinois, Indiana, Kansas, Kentucky, Maryland, Minnesota, Missouri, Nebraska, New Hampshire, New Jersey, New York, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, Tennessee, Texas, Washington.

"Annotations to other subjects are being prepared in the following states:

"AGENCY: Alabama, Arkansas, Colorado, Connecticut, Georgia, Kansas, Louisiana, Minnesota, Missouri, New Hampshire, New Jersey, Ohio, Oklahoma, Tennessee, Texas, Washington and West Virginia.

"CONTRACTS: Arkansas, Georgia, Kansas, Kentucky, Louisiana, Maryland, Montana, Oklahoma, Oregon, Tennessee, Virginia, West Virginia and Wyoming.

"CONFLICT OF LAWS: Alabama, Arkansas, California, Connecticut, Georgia, Kansas, Nebraska, New Hampshire, New Jersey, Ohio, Oregon, Virginia and Washington.

"TORTS: Arkansas, California, Connecticut, Illinois, Indiana, Kansas, Louisiana, Massachusetts, Mississippi, Nebraska, New Hampshire, New Jersey, New York, Ohio, Oklahoma, Pennsylvania, South Dakota, Virginia, Washington and Wisconsin.

"There is an additional group of manuscripts, some of which have recently been completed and others have been promised for completion early this summer. This group, which is scheduled for publication in the fall or early winter, comprises:

"AGENCY: Georgia, Michigan, Ohio and Texas.

"CONTRACTS: Kentucky and Montana.

"CONFLICT OF LAWS: Rhode Island.

"TORTS: Pennsylvania.

"TRUSTS: Kansas and Oklahoma."

The report concludes with a list of the articles and book reviews concerning the Restatement which have appeared since the last Annual Meeting and with a reference to the presentation of the Code of Criminal Procedure, practically in toto, to the Pennsylvania Legislature during the current year. Professor Keedy, it states, spent several months last fall and winter in working over the Code to adapt it to the existing legal system in that State. The result of his work has been embodied in a bill which is now pending before the legislature.

Then followed the report of the Treasurer, George Welwood Murray, and the report of the Committee on Membership, which was presented by the Chairman, George E. Alter.

Five new members were elected to full terms on the Council, which is the governing body of the Institute. They are Walter P. Armstrong, president of the Tennessee Bar Association; Garrard Glenn, professor of law at the University of Virginia; Orie L. Phillips of Denver, Colo., Judge of the Circuit Court of Appeals; Judge William I. Schaffer of the Supreme Court of Pennsylvania; and Thomas Day Thacher of New York, formerly United States Solicitor General.

PROPOSED DRAFTS CONSIDERED

Consideration of the Proposed Final Draft of Volume 3 of the Restatement of Torts was then commenced. It contained the revisions of Torts Tentative Drafts Nos. 12 and 13 and also the following chapters: Invasions of Interests in the Vendibility of Property by Disparagement, and Interest in Freedom from Unjustifiable Litigation. The Reporter, Francis H. Bohlen of the University of Pennsylvania Law School, took the platform to answer questions and to explain the text and any revisions from the Tentative Drafts, in accordance with the method heretofore developed at the Institute meetings. The Assistant Reporter was Fowler V. Harper of the Louisiana State University College of Law. Discussion of the Torts Restatement consumed the remainder of Thursday, May 6, and continued into the Friday session. The Restatement was adopted and will be officially published in the Fall.

Torts Tentative Draft No. 14 immediately followed. Professor Bohlen was also the Reporter for this Draft, except for the Chapter on "Invasion of 'Natural Rights' in Land," which was prepared by Everett Fraser of University of Minnesota Law School. The subjects covered by Tentative Draft No. 14 are:

"Invasions of Interests in the Support of Land and of Artificial Additions Thereon."

(a) "Liability for Withdrawing Lateral Support."

(b) "Liability for Withdrawing Subjacent Support."

"Invasions of Interests in the Private Use of Waters."

(a) "Watercourses and Lakes—Invasions of One's Interests in the Private Use of Waters in Watercourses and Lakes by Another's Private Use Thereof."

The next subject for discussion was the Airflight Act which has been previously referred to in this

article. Following its approval by the Institute, it is anticipated that the draft will be submitted to the next meeting of the National Conference of Commissioners on Uniform State Laws on September 20, 1937.

John Hanna of Columbia University Law School then presided as Reporter for Tentative Draft No. 1 of the Restatement of Security. This Draft deals with "Personal Property as Security," with the subheading of "Pledges—Nature and Requisites of Pledge."

Saturday afternon sessions were concerned with the subject of Property. Following its policy of drafting acts to correct defects in the present law, the Institute has prepared a proposed Uniform Property Act. The Act is entitled: "An Act to Assimilate Interests in Real and Personal Property to Each Other, to Simplify Their Creation and Transfer and to Protect the Owners of Present and Future Interests." This Act was jointly prepared by four Reporters, namely: A. James Casner of University of Illinois College of Law, J. Warren Madden of University of Pittsburgh Law School, Lewis M. Simes, University of Michigan Law School, and Henry Upson Sims of Birmingham, Alabama.

The final work of the meeting was the consideration of Property Tentative Drafts No. 7 and 8. The Reporter for Property is Richard R. Powell of Columbia University Law School. The portion covered by Draft No. 7 was Future Interests, the chapter divisions showing the subjects covered to be: Chapter 3—"Creation"; Chapter 18—"General Rules of Construction"; Chapter 26—"Powers of Appointment and Related Powers (first part)." W. Barton Leach of Harvard University Law School was the Special Reporter for Chapter 26. Draft No. 8 covered the Subject: "Division—Servitudes." Oliver S. Rundell of University of Wisconsin Law School is the Reporter for this Division. The subheadings were "Easements and Profits—Definitions; Creation: Prescription, Express Conveyance, Implication."

The various drafts were approved, subject in certain instances to minor changes in the text for the purpose of clarifying it.

The Annual Dinner was held Friday evening in the Ballroom of the Mayflower. President Pepper presided with the urbanity and wit which are so peculiarly and delightfully his own. He first introduced John Stewart Bryan, the president of William and Mary College and president and publisher of the Richmond News-Leader, who spoke of the history of the law and of legal education. The second speaker was W. Barton Leach, professor of Property at Harvard University Law School. His speech was divided into two sections. The first portion he described as his serious appeal to the intellects of the Institute members and their guests. The intellectual members and their guests found themselves in almost continuous mirth as the speaker proved that the Institute's work possesses a lighter side as he pursued its problems from the question of "Historical Comment" to the account of the "Battle of the Explanatory Notes."

Professor Leach then reached below the Speakers' table and with the assistance of President Pepper produced a handsome case from which he withdrew with a modest flourish a life-sized Accordion. And his audience was then regaled with popular tunes of yesterday and today but in which the words were entirely new, poet Leach dealing with such current subjects as the Coronation, the Supreme Court, The Institute, and the New Deal. And since he produced an excellent baritone voice and a lively accordion accompaniment, he was unanimously voted as having presented the most entertaining performance ever to come forth from a professor of Future Interests.

Previous to the Institute's regular sessions, a luncheon meeting of the Cooperating Committees of the State Bar Associations was held Wednesday, May 4th. Dean Herbert Goodrich, Adviser on Professional Relations to the Institute, presided.

Dean Goodrich stated that it was the purpose of the meeting to elicit expressions of views by those present concerning what additional fields of the law the Institute might appropriately undertake to restate. It was pointed out by the Chairman that the Institute had already done some work in the subjects of Business Associations and Sales of Land and that while no present effort was being directed currently to these subjects, it was probable that they would be completed as occasion and resources permitted.

Discussion from the floor led to a number of suggested subjects for future work, which were then referred to the Council of the Institute for final determination as to which should be recommended to the membership for restatement.

COMMITTEE ON PROFESSIONAL ETHICS AND GRIEVANCES—OPINION 170

Judicial Ethics—Judge as Stockholder in Corporate Party Litigant.—A judge who is a stockholder in a corporation which is a party to litigation pending in his court may not, with propriety, perform any act in relation to such litigation involving the exercise of judicial discretion.

We are asked by members of the Association whether a judge of a court of record should hear and determine an *ex parte* application for a temporary injunction to enjoin the alleged unlawful acts of the defendants with respect to property of the applicant, when the judge is a stockholder in any corporation named as a party to the action.

The Committee's opinion was stated by MR. MCCOY, Messrs. McCracken, Sutherland, Phillips, Arant, Houghton and Bane concurring.

An application for an interlocutory injunction is addressed to the sound judicial discretion of the court. In passing on such an application the court determines whether the showing made entitles the applicant to such relief. In so doing the judge performs a judicial act involving the exercise of judicial discretion, (Alabama vs. United States, 279 U. S. 229; Public Service Commission vs. Wisconsin Telephone Co., 289 U. S. 67) as distinguished from a mere ministerial act not involving the exercise of judicial discretion, such as the issuance of a citation required by law upon the filing of a petition. See In re Leonard's Estate, 95 Mich. 29, 54 N. W. 1082.

Judicial Canon 29 provides that a judge should "abstain from performing or taking part in a judicial act in which his personal interests are involved."

We are of the opinion that a judge should not perform a judicial act, involving the exercise of judicial discretion, in a cause in which one of the parties is a corporation in which the judge is a stockholder.

THE CONSTRUCTION OF SURETY BONDS

By Stevens T. Mason
Member of the Detroit Bar

UNDER the law merchant, the liability of a gratuitous surety was held to be strictly according to the terms of his bond. The slightest deviation by the obligee discharged the surety. All doubts and technicalities were resolved in favor of the surety. His obligation was said to be *strictissimi juris.* (In strictest law). Of late years, however, suretyship has become a business. Commercial surety companies are signing most of the bonds for fiduciaries, contractors and litigants. Occasionally one sees bonds with personal sureties, but they are becoming less and less frequent. Laws of various states have gone so far as to give judges the right to refuse personal sureties in certain cases and demand a surety company bond.

With the change in the status of the surety there has come a change in the rules for determining the liability of the surety. The surety is no longer the favorite of the court that he used to be. He no longer gets that tenderness of treatment which the common law gave him.

On the contrary, the latter day courts say that since the surety companies write their own contracts, insert their own conditions, charge a premium and make a profit, the contract should be construed most strongly against the surety, and in favor of the obligee. In making this change courts have swung so far the other way that they created a rule *strictissimi juris* in favor of the obligee to the prejudice of the surety.

The Surety Collects a Premium

It is unfortunate that so many courts place such emphasis on the payment of the premium. A contract should not be regarded with disfavor merely because it is paid for. One does not regard an automobile or a horse with suspicion because he pays for it. On the contrary, it is usually the "gift horse" that is regarded with suspicion. As a general rule we have more respect for the things we pay good money for than the things we get free. Why should the rule be exactly the opposite with respect to suretyship?

There seems no logical reason for this. The corporate surety bond furnishes a hundred per cent protection to the obligee. A personal surety bond is at least flimsy and uncertain. And yet, in court, the personal surety even though he is a professional bondsman, is the favorite, and the corporate, hundred per cent surety is the enemy. This is not reasonable, nor is it just.

How absurd it would sound if anyone should contend that the construction of the bond should vary in proportion to the amount of the premium. And yet, if the courts lay such emphasis on the point that the surety is a surety for hire, it is just as logical to reduce the argument to an absurdity by considering the amount of the hire. This would result in cut rate companies getting a better construction than companies charging the normal premium. The result would be, "the cheaper the price the better the product," which is indeed an absurdity.

People are constantly making the most extraordinary claims against surety companies and justifying their position by saying that they paid a premium. Usually the person that makes the most extravagant claim did not pay the premium at all. In fact, in most surety bonds the obligee is not the party who pays the premium. Furthermore, a review of lists of uncollected premiums would show that the point is more fanciful than real, because when there is a default on the bond there has usually been already a default in the payment of a premium. Certainly no one could contend that surety bonds which are sold on credit should receive a more lenient construction than those for which cash is paid.

In all fairness, the presence or absence of a premium should not influence the court or jury in the slightest degree. The whole idea is illogical.

In Bench Drainage District vs. Maryland Casualty Co. 278 Fed. 67, the 8th C. C. A. said:

"The enforcement of the express terms of the contract of suretyship cannot be made to depend upon whether the surety is compensated or not. It cannot be one contract when the surety is compensated and another contract when the surety is not compensated."

The Surety Draws the Bond

There is some merit to the contention that when one signs a contract which he wrote himself and makes it ambiguous, the language should be construed against him. But this reasoning does not, as a rule, apply to corporate surety bonds. The language of a surety bond is very often prescribed by statute or prepared by the assured, or by some trade association such as the American Bankers Association, the American Institute of Architects, etc., and practically all of the courts have held that construction against the surety company does not apply when the wording is not that of the company, but is taken from some source for which the assured, and not the company, is responsible. Hewins vs. London Association, (Mass.) 68 N. E. 62; Edner vs. Ohio State Life Insurance Company, 121 N. W. 315; Nelson vs. Traders Insurance Company (N. Y.) 74 N. E. 155; Rosenthal vs. Insurance Company, (Wisc.) 149 N. W. 155; Sturgis National Bank vs. Maryland Casualty Company (1935) 252 Mich. 426. In spite of these decisions there are still some courts which ignore this point of authorship. Possibly because it has not been properly presented by counsel.

The Bond Is Seldom Ambiguous

It must always be remembered that unless there is an ambiguity there is no reason for a construction either favorable or unfavorable. As the court said in Lesher vs. U. S. F. & G. Co. 239 Ill. 502; 88 N. W. 210, "Here there is no ambiguity. No room is left for construction." And as the Supreme Court said in Guaranty Company vs. Savings Bank, 183 U. S. 402 "this rule cannot be availed of to refine away terms of a contract expressed with sufficient clearness to convey the plain meaning of the parties."

And yet, under the guise of construction, courts have gone to extraordinary lengths even amounting to practically rewriting a bond and creating a hazard which neither the surety not the principal ever intended. Recently courts have even gone to the extent of reading

a statute into a public official bond, and construing the whole works against the surety company. The unreasonableness of this is obvious because it constitutes a construction against the principal as well as against the surety. Certainly there is no reason why the principal should suffer because his surety happens to be a corporate one.

Courts say that sureties are free to contract, and then they construe the contract of suretyship in such a way as to destroy that freedom.

The effect of some decisions is to make it increasingly difficult for certain principals to obtain bonds at all. If the courts are to hold that the bond of a bank employee is to be construed far beyond, or even against its own provisions, does it not seem that many an employee will find it difficult or impossible to obtain the necessary bond? If the bonds of fiduciaries and public officials are to be held responsible for moneys lost in the failure of banks, even after due care has been exercised in the selection of depositories, will not this have an effect upon the obtaining of bonds by principals similarly situated? If certain license bonds are to be held subject to forfeiture for minor infractions, or held to be open to successive recoveries aggregating many times the penal sum of the bond, will not many worthy applicants, because of inability to obtain bonds, be denied the right to the issuance of a license? If the bond of a contractor is to be held for all sorts of obligations of a sub-contractor or even a sub-subcontractor, over whose affairs the original contractor never had any control, will not this prevent many contractors from qualifying? Moreover, premiums are based on experience. Losses resulting from strained construction must ultimately be borne by the insuring public.

As a matter of fact, corporate surety bonds seldom require construction. They are expressed in words of ordinary meaning, and in terms as clear and concise as the English language is capable of making them. Usually there is no room for construction. But when there is a doubt that doubt should be so construed as to carry out the intention of the parties without prejudice.

The corporate surety is an institution that is of inestimable benefit to modern business transactions. Its contracts should, like other contracts, be construed according to their terms unhampered by strained construction. Fairly and without favor. Every burden placed by the courts on corporate suretyship is a handicap to modern business.

The Present Crisis, if Any

(New York Times.)

"It is difficult to avoid the conclusion that, having decided too suddenly in favor of a plan which has encountered far greater opposition than he anticipated, it is now necessary for Mr. Roosevelt to overemphasize the element of 'crisis' in an attempt to validate his unfortunate decision. Without a direct reference of the question to the public or a direct mandate from the country, the President, has swerved from the course chartered in the Democratic platform and proposes to force on the Supreme Court a change which would shake the prestige of that institution and disturb the traditional American system of checks and balances.

"If the country now faces a crisis, it is a constitutional crisis, and it is of the President's own making."

Current Events

Medical Defense Plan of Ohio Medical Association Held to Constitute Unlawful Practice of Law—Question Submitted to Bar Association Committees by Agreement—Decision Will Be Accepted

A MEDICAL defense plan by which members of the Ohio State Medical Association were furnished legal advice and assistance in malpractice suits was declared to constitute the unauthorized practice of law and therefore unethical conduct of attorneys engaged therein, by the American Bar Association Committees on Unauthorized Practice of the Law and on Professional Ethics and Grievances after a joint hearing by the two committees in Washington, D. C., on May 4. Representatives of the Ohio State Medical Association and of the Ohio State Bar Association appeared before the committees to argue the matter, printed briefs having been filed in advance. The oral presentation for the Ohio State Bar Association committee was made by Chairman Joseph L. Stern and Mr. Charles W. Racine, former President of the Ohio State Bar Association, made the principal presentation for the Medical Association.

The matter came before the American Bar Association Committees as a result of a meeting between a sub-committee of the general committee on unauthorized practice of the law of the Ohio State Bar Association and representatives of the Ohio State Medical Association, in Columbus, Ohio, on February 26, 1937. That meeting was called to discuss the activities of the Ohio State Medical Association under its Medical Defense Plan, the bar association committee claiming that said Medical Defense Plan constituted the unauthorized practice of the law and that the attorneys of the association violated Canon 35 of the Canons of Ethics of the American Bar Association in acting in connection with the Defense Plan. It was then agreed that the question involved should be submitted for determination to the joint consideration of the two committees of the American Bar Association. Both parties agree to abide by the decision rendered.

The Ohio Medical Defense Plan became operative on May 18, 1916. This plan and rules and regulations continued in effect from May 18, 1916, until March 15, 1936, on which date a revised Defense Plan became effective. This revision was made following conferences with a committee of the Cleveland Bar Association, in order that certain objections might be eliminated, and in order that the terms of the plan would conform to the actual practice and procedure of the Defense Committee.

The scope of the Plan which has made Medical Defense available to members of the Ohio State Medical Association, is described as follows in a circular issued by that Association:

Scope of Plan

Medical defense shall extend only to civil malpractice suits, and shall under no circumstances be available to any member who, after investigation by the Committee on Medical Defense, is believed to be guilty of criminal abortion, feticide, homicide or any criminal act, or who has not conformed to recognized ethical laws. The Association will only assist in the defense of suits brought for claims arising in the course of legitimate professional work.

The Association assumes no legal obligation to any member, but will, to the extent and under the proper circumstances, to be determined by the Committee on Medical Defense, contribute to the expense of such defense and will otherwise cooperate with the member sued in the making of investigations, assisting in obtaining witnesses, recommending legal counsel (if requested), furnishing the advice and assistance of the General Counsel of the Association to the legal counsel employed by the member sued, and otherwise extending such aid and suppo as the committee may find practicable and proper.

The Association will not assist in the defense of a suit in any case of fracture or like injury where an X-ray has not been taken and kept on file, unless it can be shown to the satisfaction of the Committee on Medical Defense that at the time and place it was impossible to secure an X-ray.

Supplemental Rules

3. A member who has been sued or threatened with suit may employ counsel of his own selection, but upon request of such member the Committee on Medical Defense, or General Counsel of the Association, will recommend competent legal counsel to such member. The legal counsel employed by the member sued or threatened with suit shall be entitled to advise or confer with the General Counsel of the Association in all matters pertaining to defense of the case. The Association will not in any event contribute to the expense incurred by such member, unless the legal counsel employed by him shall cooperate fully with the Committee on Medical Defense and the General Counsel of the Association.

4. The Association will not contribute to the expense in the defense of a suit if brought on a cross-complaint, where the physician has sued to collect his bill for services within one year of the termination of such services.

6. Where the claim asserted against the member is covered by a policy of indemnity insurance held by such member, or the member is in the employ of any governmental or other agency responsible for his defense, the Association will not ordinarily contribute any expense, but will give such aid as the Committee on Medical Defense shall deem appropriate.

It appeared at the hearing that the medical defense activities of the several constituent associations of the American Medical Association have been in existence for many years. The most recent information as to their scope is contained in a communication from the Bureau of Legal Medicine and Legislation for the year 1928. At that time, the constituent state medical associations assisted members in the defense of malpractice claims in the District of Columbia and in the states of Arizona, Connecticut, Delaware, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Mississippi, Missouri, Nebraska, New Hampshire, New Jersey, New York, Ohio, Oklahoma, Pennsylvania, Tennessee Texas, Utah, Vermont, Washington, West Virginia, Wisconsin and Wyoming. In California medical defense was made available through a separate organization, membership in which was conditioned, among other things, on membership in the state association.

The questions arising may be stated as follows:

(a) Does the Medical Defense Plan of the Ohio State Medical Association, as written and as administered in practice, constitute the unauthorized practice of law?

(b) Is it unethical for a lawyer to act for the Ohio State Medical Association

in furtherance of the Medical Defense Plan?

(1) Is such representation a violation of Canon 35 of the Canons of Ethics of the American Bar Association?

(2) Does such representation constitute solicitation, contrary to Canon 27 of the Canons of Ethics of the American Bar Association?

The Committees, by a unanimous vote of all members of each Committee, answered question (a), (b) and (1) in the affirmative. They answered (2) in the negative.

The far-reaching importance of this decision by the two Committees is obvious and needs no comment.

Following the announcement of the decision, officers of the Ohio State Medical Association announced the plan was being discontinued and their members so notified.

American Judicature Society Meets

MEMBERS of the American Judicature Society attending the annual meeting in Washington May 5 heard a report of progress. For two years the Society has centered its administrative efforts in a campaign for increased membership in order to qualify for a grant in aid offered by the Carnegie Corporation. The increase in membership, plus a bequest of $1,000 by Mr. Elihu Root, enabled the Society to meet the requirement for the coming year, so that it will receive $6,000. Aid for four succeeding years depends upon maintaining an income twice the amount offered by the Carnegie Corporation. The Society's membership has grown from about 500 to about 1,500 and the circulation of its Journal from a little less than 5,000 to 7,500. The assistance given permits of a large increase in circulation and of added editorial support.

The election of officers resulted in retaining Mr. Newton D. Baker as president, and the following vice-presidents; Hon. Frank E. Atwood, Judge Van Buren Perry, Frank B. Walker and Prof. Silas C. Harris. Mr. Oscar C. Hull was elected as successor to Clarence N. Goodwin as chairman of the board, and Secretary Herbert Harley was reelected. Directors in all states were elected, to the number of 100.

An open session arranged by Mr. Goodwin was held after the annual meeting for a debate and discussion of the pending federal judiciary bill, and addresses were made by the former chairman and Prof. Thurman Arnold, in support of the bill. Senator Van Nuys was expected to present the opposition side, but was not present. The views submitted by the speakers were not intended to represent the position of the Judicature Society. The Directors had previously authorized submission of the questions involved to the members for a referendum vote. Newspaper reports of this open session gave the impression that the Society was committed, and by the relatively few who were in Washington on May 5. The votes on the five questions will be reported later.

In the evening a dinner was given for members and their ladies by way of celebrating the Society's present good fortune.

Tentative Program for Junior Bar Conference at Kansas City—Officers to Be Elected in New Way—Open Hearings by Resolutions Committee—No Outside Speakers

THE fourth annual meeting of the Junior Bar Conference at Kansas City will have no outside speakers, will conflict but slightly with other section meetings and will elect officers in a new way, according to tentative plans for the meeting formulated by the Program Committee and Council at Washington on May 5.

The two business sessions of the Conference, it was planned, will be held Sunday afternoon, September 26th, and Tuesday morning. Election results will be announced and new officers installed at a breakfast meeting Wednesday morning. Only one of the sessions—the Tuesday morning session—will conflict with meetings of any of the other sections of the Association. In previous years all three meetings of the Conference where held while other sections were in session.

Instead of balloting for officers and Council members at a session of the Conference, as in the past, this year Conference members will register their choices at a polling place to be opened during specified hours and supervised by the Committee on Elections. The Nominating Committee personnel will be announced on Sunday afternoon, will receive nominations Monday afternoon, and will report Tuesday morning, at which time other nominations may be made from the floor.

Another new feature of this year's program will be the holding of open hearings by the Resolutions Committee on Monday morning and on Monday afternoon, to enable proponents of resolutions orally to present the merits of their propositions. Proponents will also have another opportunity to debate their resolutions before the sessions of the Conference when the Resolutions Committee reports. The Council urges persons desiring to submit resolutions to do so, if possible, in advance of the meeting, to assure ample opportunity for consideration. Until announcement of the name of the Chairman of the Resolutions Committee, resolutions, with supporting arguments, should be sent to the Secretary.

Believing that the sessions of the Conference will be fully occupied with Conference business, the Council and Program Committee decided to invite no outside speakers. One of the principal subjects of business to be debated and worked out by the Conference will be the program for next year.

Chairman Joseph D. Stecher, who, like President Roosevelt, wants to leave the engine, when he steps down at the end of his term, with steam up and ready to travel in the right direction, has made definite plans to this end. He has asked Grant Cooper's Activities Committee to prepare for submission to the Council at or prior to the Kansas City meeting, a complete program for the coming year. So that there will be no gap in Conference personnel, Mr. Stecher has requested each member of the Council to obtain from State Chairmen and others, and to submit at Kansas City recommendations, supported by full biographical data, for the various committee and other appointments. This procedure, he says, "will not only avoid the several months' delay which always ensues in making appointments, but also it will be productive of more complete and accurate information as to possible appointees and will provide the opportunity for a more equitable distribution of appointments."

The Council has pledged its support to the Chairman, and when the Junior Bar Conference chugs out of Kansas City on its journey through the coming year, it is expected that it will carry a full and carefully selected crew and a well balanced cargo of objectives.

One of the most important committees of the Conference—that on the Economic Condition of the Bar—has begun its valuable studies. LaVergne Guinn, Dallas, Texas, a former Vice-Chairman of the Conference, is Chairman, and his fellow members are Alfred T. White of New York and John H. Caruthers of St. Louis. This committee will cooperate with the American Bar Association Committee on the Economic Condition of the Bar, and will study the problem from the angle of the younger lawyers. It is hoped that the Junior Bar Committee will be in a posi-

tion to make at least a preliminary report at the Kansas City meeting.

Several changes in the personnel of the Conference have taken place in recent weeks. Joseph H. Wheeler of Los Angeles has replaced as State Chairman Milford Springer, who has changed his abode to Washington, D. C. Alfred T. White has become State Chairman in New York.

Auvergne Blaylock of Memphis, Tennessee, has taken the place on the Membership Committee vacated by Joe V. Williams, Jr., of Chattanooga. Joseph D. Calhoun of Media, Pennsylvania, has assumed the duties of A. Warren Littman of Newark, New Jersey, on the Committee on Publications. Woodworth L. Carpenter of Providence became Rhode Island's State Chairman upon the resignation of S. Everett Wilkins, Jr.

Washington News—Justice Van Devanter Retires—To Reduce Board of Tax Appeals Cases—Counsels' Arguments Preserved—Holding Company Case Docketed—Control of Protective Committees

May 20, 1937.

Justice Van Devanter Retires

COMPLETING a distinguished service of 26 years and five months, Associate Justice Willis Van Devanter has retired from regular active service on the Supreme Court, effective June 2, 1937.

The letter announcing his retirement said:

"My dear Mr. President:

"Having held my commission as an associate justice of the Supreme Court of the United States, and served in that court for 26 years, and having come to be 78 years of age, I desire to avail myself of the rights, privileges and judicial service specified in the act of March 1, 1937, entitled 'an act to provide for retirement of justices of the Supreme Court,' and to that end I hereby retire from regular active service on the bench —this retirement to be effective on and after the 2d day of June, 1937, that being the day next following the adjournment of the present term of the court.

"I have the honor to remain, very respectfully yours.

"WILLIS VAN DEVANTER.

"The President."

Chief Justice Hughes is quoted as having commented that the retirement of Justice Van Devanter from the Supreme Court "is a most serious loss," and further that "his extraordinary memory and grasp of precedents, his acumen and fairness enabled him to render a service of inestimable value in our deliberations, while his equable temperament, his tact and unfailing kindliness made him an ideal associate. We shall greatly miss him."

Justice Van Devanter is listed as of Cheyenne, Wyoming. He was born at Marion, Indiana. His judicial career began when he was appointed chief justice of the territorial supreme court by President Harrison in 1889. He was continued in a similar capacity by election upon the admission of Wyoming as a state in 1890. Soon thereafter he retired to private practice. After having served as Assistant Attorney General under an appointment by President McKinley from 1897 to 1903, he was appointed United States Circuit judge, eighth circuit, by President Theodore Roosevelt in 1903. His appointment as Associate Justice of the United States Supreme Court was by President Taft December 16, 1910 and he took the office January 3, 1911.

Justice Van Devanter was considered an authority especially on matters of federal jurisdiction and public land and water rights. He had been assigned to the Department of the Interior when Assistant Attorney General. It is understood that Justice Van Devanter plans to spend much of his time on a farm he recently purchased in the vicinity of Ellicott City, Maryland, and to be available for assignment by the Chief Justice to one of the circuits.

Immediately upon the retirement announcement, speculation in Washington moved so rapidly that to keep up with it was hopeless, both on the question of what effect Justice Van Devanter's retirement might have on the President's judicial reorganization proposal and as to whom he would appoint as successor.

One of the legal questions of some interest which was suggested was whether "the same rights and privileges with regard to retiring, instead of resigning, granted to judges other than Justices of the Supreme Court by section 260 of the Judicial Code", which were extended to Justices of the Supreme Court by Public Law No. 10, approved March 1, 1937, U. S. C. A. Current Service Pamphlet No. 1, p. 23, constitute "increased emoluments" of "any civil office under the authority of the United States." If they do, then "no Senator or Representative", who was such when the "increase" was made, shall be appointed to such office "during the time for which he was elected." Constitution Art. 1, Sec. 6, cl. 2.

Prior to the above-mentioned enactment of March 1st, this year, a Supreme Court Justice, having held that commission "at least ten years, continuously or otherwise, and having attained the age of seventy years", might *resign* and "during the residue of his natural life receive the salary which is payable at the time of his resignation." But Justices of the Supreme Court, previously, were excepted from similar rights and privileges given to judges of other federal courts who might merely *retire*. T. 28 U. S. C. A. Sec. 375, 1936 pocket supplement.

The suggested way around this dilemma, if such it proves to be, is for Congress to amend the Sumners Act, Act of March 1, 1937, so that it would not apply to one of its present members who might be appointed to the Supreme Court bench. Whether a later Congress might be expected in like manner to increase the emoluments of such a future Justice after expiration of "the time for which he was elected" to be a member of Congress has not been stated. The Attorney General is reported to have said that this matter of the eligibility of a member of Congress was a delicate question which he could not discuss but that once Justice Van Devanter's successor was appointed by the President and confirmed by the Senate, the appointment's legality would be unquestionable.

To Reduce B. T. A. Cases

Effort is being made further to reduce the number of cases pending before the United States Board of Tax Appeals. Three members of the Board have been designated to serve with three members of the staff of the Chief Counsel of the Bureau of Internal Revenue as a committee to consider the rules and procedure of the Board and to make recommendations for expediting tax cases before the Board. Mr. Logan Morris, member of the Board, is Chairman of the joint committee and Mr. Stanley Surrey, of the Chief Counsel's office is its Secretary.

There have been between five and six thousand cases of asserted tax deficiencies appealed to the Board annually. Experience has shown that the Board can hear and decide on the merits approximately 1,600 cases a year. Although determined and effective efforts have been made to reduce the number of cases, there still were pending 8,644 January 31, 1937, which involved alleged deficiencies in tax of $506,000,000. There

were 21,639 cases pending June 30, 1928.

It is hoped substantially to reduce the number of cases required to be heard by the Board by encouraging stipulation of facts in a greater number of cases and by other changes in procedure designed to expedite settlements. Chairman Eugene Black of the Board has invited attorneys who appear before it, and also the taxpayers, to submit to him, for transmission to the Committee, suggestions relating to the Board's procedure.

Arguments Preserved

The arguments of counsel before the Supreme Court in a number of recent cases have been printed as Senate Documents, to wit:

National Labor Relations Act cases lately decided, and cases under the Railway Labor Act—S. Doc. 52.

Social Security Act, case involving Title IX thereof, and case testing the Alabama Compensation Law as to its constitutionality—S. Doc. 53.

Social Security Act, case on constitutionality of Title VIII—S. Doc. 71.

Holding Company Case Docketed

If the petition for certiorari is granted before the Supreme Court adjourns, there should be argued in October of this year the case, Electric Bond and Share Company, et al., v. Securities and Exchange Commission, et al., No. 995. Should the petition not be granted at this time, it is likely to reach the Supreme Court later on substantially the same basic issues as those now urged which go to the merits of the controversy.

This seems to be a strong case for following the possible procedure of going directly to the Supreme Court without a hearing in the Circuit Court of Appeals. The company cites the Government's position that a decision of this, its own selected test case, should be had before the several trial courts determine the 40-odd injunction proceedings pending against enforcement of the Holding Company Act. This was the Government's position in Landis, et al., v. North American Company, 299 U. S. 248.

It is contended in support of granting the certiorari writ now that "An extraordinary situation is disclosed under which enforcement of a statute of the United States, regulating, or assuming to regulate, a great industry is quite properly held in abeyance upon the responsibility of the officers of the United States pending the time when the Court shall ultimately determine these questions. Under these circumstances the interest of the United States, of the petitioners, and, even more emphatically, the interests of the people of the United States, justify the issuance of the writ at this time."

The case was decided in the Government's favor, January 29, 1937, by the District Court for the Southern District of New York, opinion by Circuit Judge Mack. Securities and Exchange Commission v. Electric Bond and Share Company, et al., 18 F. Supp. 131. That Court sustained the separability provisions of the act and therefore did not pass upon its death-sentence provisions. It upheld the provision for registration of holding companies and denying to unregistered companies for certain purposes the use of the mails and instrumentalities of interstate commerce. The company still maintains that it has a right to a determination on its cross-bill and counterclaim of issues questioning the constitutionality of the provisions of the statute other than the registration provisions.

Four of the constitutional challenges to the statute are:

1. That the act does not come within the power of Congress to regulate interstate commerce or the mails in that it seeks to make applicable to registrants and their subsidiaries a multitude of prohibitions, regulations, and penalties which have no relation to interstate commerce or to the mails.

2. That it violates the due process clause of the Fifth Amendment since the registration provisions would extend to persons and to acts without, as well as to those within, the constitutional authority of Congress.

3. That it violates the Tenth Amendment in the assumption by the federal government of powers not granted and therefore reserved to the States or to the people.

4. That the act seeks to delegate legislative powers to the Securities and Exchange Commission.

Supreme Court to Adjourn June 1

The adjournment of the present term of the Supreme Court on June 1st was provided in an order made May 17th which said:

"The Court will take a recess from today until next Monday and from that day until Tuesday, June 1, upon which day it will adjourn for the term.

"No motions, except motions for admission to practice, will be received after Monday, May 24."

Control of Protective Committees

The organization and operations of bondholders' and stockholders' protective committees in effecting or attempting corporate reorganizations, in soliciting proxies, and in like activities will be placed under the control of the Securities and Exchange Commission if there is enacted the bill, H. R. 6968, recently introduced by Representative Lea, of California.

Declarations similar to those under the Securities Act would have to be filed with the Commission by the person expecting to exercise the proxy or use the deposit. In the solicitation of assents under a voluntary readjustment, it would be required that the declaration be filed by the person who would make the solicitation or who would permit his name to be used for that purpose. Schedules set out in the bill show what information is to be given in the declaration. One of these schedules includes municipal and foreign debt adjustments. Among the points of information required would be the identity of the issuer, facts showing its capital structure and financial condition, names of the underwriters of its outstanding securities, name of the person making the solicitation, its purposes, and a description of the plan of reorganization.

A proper declaration filed with the Commission would become effective twenty days thereafter if the Commission has not issued a refusal order. Grounds for issuing a refusal order might be: finding that the solicitor or any member of a committee is the issuer, or was, within one year prior to the filing of the declaration, a director, officer, or employee of the issuer; finding that the solicitor is or was an underwriter of any outstanding securities of the issuer, or was within one year connected with such underwriter; finding that the solicitor has a conflict of interests; or determining that the plan is not being proposed in good faith. In a voluntary readjustment, a representative of a majority of the directors elected by a certain class of security holders would have authority to solicit members of that class.

There would be exemptions preventing the bill from affecting the solicitation of proxies, assents, etc., in designated cases, for example: where, on the date the act becomes effective, solicitation already begun is 50 per cent or more complete; railroad reorganizations under section 77 of the Bankruptcy Act; those coming under the jurisdiction of the Comptroller of the Currency, or of State banking or insurance authorities; those in which the amount of outstanding securities is less than $100,000; those relating to commercial paper having a maturity of less than nine months; those relating to the securities of religious, charitable, and similar organizations; and those relating to farmers' cooperatives. The Commission might add other exceptions if it finds the application of the law to a particular kind of solicitation is unnecessary by reason of

the small outstanding amount of securities or the limited character of the solicitation. A security holder would not be prevented from acting solely in his own behalf; nor would the act prevent a group of not more than twelve from acting for themselves directly or through a representative.

In order to propose a reorganization plan, one would have to be the beneficial owner of securities or of a claim against the issuer, or a trustee under the proposed new Trust Indenture Act. Disclosure would be required of arrangements for underwriting, as well as for the securing of new or additional capital, for the management of the reorganized company, as to the fees and expenses incident to the reorganization, and the priorities of the several classes of security holders.

Intervention by the Commission would be authorized in any reorganization proceeding pending in the federal courts; and it would be a necessary party where the amount involved was more than $5,000,000. It might act as arbiter between a declarant and the security holders which it represented; and could review their reasonableness or could determine the fees and expenses of any declarant. It could supervise all activities and powers exercised under any proxy, deposit agreement, or the like; but could be named as arbitrator only with its consent and once named, could resign at any time.

While a declaration was in effect, it would be unlawful for any person to whom it applied to buy or sell any security of the issuer during the pendency of the reorganization, voluntary readjustment or other proceeding. There are provisions for the Commission reporting to the courts, or other official agencies of the United States, on separate reorganization plans. In reorganizations pending before State courts, the Commission could intervene only upon the request of the court.

Findings would be made, in the reports of the Commission, with respect to the fairness and equity of the treatment of the different classes of security holders by the terms of the plan; the adequacy of steps taken to discover and collect assets of the issuer or of individual security holders or claimants, including causes of action against officers and directors of the issuers and underwriters; the reasonableness and propriety of fees and reorganization expenses; provisions made in the plan for management of the reorganized issuer with respect to interests of the security holders; and any other elements of the plan.

The act would make it unlawful for any person in the solicitation of any proxy, deposit, assent, etc., through the use of the mails or any instrumentality of interstate commerce to use any scheme or artifice to defraud, to make any untrue statement of a material fact, or to omit to state any material fact, or to give publicity to any circular, advertisement or newspaper article with reference to solicitation of proxies, reorganization plans, etc., for which the writer is paid, without disclosing the consideration therefor and the fact that it is a paid advertisement. Broad authority is given the Commission to make effective the purposes of the bill by the necessary rules and regulations, to hold hearings, to secure evidence, and to issue such orders as may be necessary. Its orders might be reviewed by the courts in the manner provided by the Securities Act of 1933. Penalties for violations of the act might be as much as a fine of $5,000 or imprisonment for five years or both.

Annual Review of Legal Education Shows Decrease in Law School Attendance and Bar Admissions—Trend Toward Higher Standards of Admission Is Continuing—Current Developments

IN the Annual Review of Legal Education for 1936, just published by the Section of Legal Education and Admissions to the Bar, the first accurate figures made public on law school enrollment and bar admissions last year show a decrease of 4% in each. Law school enrollment of 40,218 is now back to the 1934 level.

Bar admissions have been declining slowly since the first figures were published in 1931, but last year the drop of 4% was larger than at any time within the past five years. 7,615 admissions by examination, and 976 by diploma brought the total of new admissions for 1936 to 8,591. On the average, 46% of the candidates taking each bar examination passed. The number of law schools showed a decrease of 5 to a total of 190, approximately half of which were approved schools. Also, for the first time, the number of students in approved schools was shown to exceed those in unapproved schools.

Two interesting articles dealing with legal education are featured in the Review. One of these, by Dean Lloyd Garrison of the University of Wisconsin, gives a detailed account of current developments in the law schools at the University of Chicago, Northwestern, and the state universities of Illinois, Michigan, Minnesota and Wisconsin. The trend in those institutions, Dean Garrison reports, is toward a more careful selection of students, continuous experimentation with new legal materials and new teaching techniques, a modern curriculum which includes subjects of comparatively recent origin such as Administrative Law, Labor Law, Taxation, etc., and makes a number of new combinations of old subjects, and also toward a more definite contribution than in the past by the faculties of these schools to what might be termed work for the improvement of the administration of justice. The following quotation is from Dean Garrison's article:

"It is a sign of the times that in all the schools many faculty members are engaged in work of a quasi-public nature, such as the drafting of legislation, the giving of legal advice to governmental agencies, service on committees appointed by bar associations or governments, participation in judicial councils, and carrying on research in connection with these and similar activities. This shift from the purely scholarly studies and writings of a generation ago toward public service is of much significance and will in its own way, as it has already begun to do, bring a new air of reality into law school classrooms.

"Symptomatic also of the impact on law schools of the changing institutions and concepts of government which characterize our age, are the expension of the public law courses, already referred to; the operation of an Air Law Institute and a Scientific Crime Detection Laboratory by the law school at Northwestern; the drafting of legislation by certain law review editors at Wisconsin, and by students in the legislation course at Minnesota and perhaps elsewhere; the rotating apprenticeship of post-graduate law fellows at Wisconsin in governmental departments and commissions; and the sponsorship by various schools of meetings and forums on questions of public law.

"There is some risk that the immersion of teachers and even students in contemporary problems, if carried too far, may crowd out the devotion to scholarship without which education degenerates and long-range problems are neglected. I do not think the danger point has yet been reached, for in all the schools there are many men, who, to paraphrase Justice Holmes, have set their course by stars they have never seen and are digging by the divining rod for springs they may never reach. But if we are not careful, there is some chance that the acclaim given to external activities, the excitement of participation in them, and the very substantial aid which law teachers can give to the profession and the public in the solution of their current difficulties,

may result, first, in distracting the attention of too many potential scholars from the central task of producing for the future and not merely for the present; secondly, in a tendency to select teachers whose tastes and capabilities run toward the outer world rather than the inner quest; and thirdly, in the diversion of a disproportionate amount of available funds and manpower to undertakings of merely immediate value.

"To counteract any possible danger in these directions, I should think it might be well for the law schools to take stock of their research activities; to compare notes; to co-ordinate their efforts and their plans; and to serve notice that the age-old task of scholarship is still their first consideration. This word of reminder is not intended as a disparagement of the generous response by law teachers to the needs of their times—a response which perhaps has been too much lacking in the past. Certainly there must be room for both kinds of activities, which in a sense overlap and supplement each other. The only question is one of proportion and of emphasis. If we do not forget that there is such a question we shall not be likely to go wrong.

Professor James Grafton Rogers of Yale, chairman of the Legal Education Section, takes for his subject "The Standard American Law School." His article gives a graphic and inclusive panorama of the diverse character of legal education in the United States today. On this subject he writes:

"There are almost two hundred institutions in the United States, large and small, rich and poor, which undertake to offer a complete legal education for admission to the bar. About half of these are rated as satisfactory according to present standards by one or both of the two national organizations which assume the function of inspecting and accrediting schools of law. These approved and accredited schools may be called 'standard.'

"The whole list of about 190 schools vary in form from one-man affairs, carried on for love or a very little money to great commercial enterprises at one maximum and departments of magnificent universities at the height of another type. The teaching staff in these schools varies from a minimum of three or four to about forty men. The schools occupy at one extreme a few stray rooms. At the other there are schools which employ buildings and grounds which have cost several million dollars, and are the flower of architectural equipment existing anywhere for strictly educational purposes, if we exclude one or two university library buildings. The income of the schools ranges from perhaps $1500 a year to about $800,000. Their libraries range from nothing worth mentioning to 500,000 volumes, and include half a dozen of the best law libraries the world has seen. One school library is the largest storehouse of printed law ever assembled.

"These schools have been enrolling in recent years something over 40,000 students each session, or an average of about 200 students each. About half these pupils are in the schools "approved," as the phrase goes, by the two important accrediting organizations. A majority of the other half of the forty thousand are in night or late afternoon classes in the unapproved schools of a few great cities—boys, men and women who are working for a living and studying law in the little margin of time and energy left between earning and sleeping. The individual schools vary in enrollment from about twenty at the minimum in one school in a small southern town to two thousand in a Brooklyn school chiefly serving night students. The preparation required for admission varies from no standard of schooling to a discriminated bachelor's degree. Six schools require a degree for admission in all cases; thirty more require three years of college work, but three-fourths of the students are in schools requiring, at least nominally, two years of college preparation for enrollment. The teaching methods are as varied as the men who conduct them. There predominates a scheme of study and discussion called the 'case system,' based on the study of printed court opinions especially arranged and abbreviated for students in books dealing with separate topics in the law. The old combination of learning by reading texts and listening to lectures persists here and there.

"In 1921 only one state in the Union had a requirement for two years of college training prior to admission to the bar. As this is written, thirty-three states have in force that rule, applicable now or in the early future. These states contain within them three-fourths of the national population and of the practicing lawyers. All the very large states, important in terms of population and industrial development, except California have fallen into line. Today about half of the students in the nation are in schools 'approved' by the two critical agencies. In 1920 only a fifth at most were enrolled in schools which measured up to the present standards.

"The development is particularly striking when we remember that for nearly three centuries, from 1620 to 1920, there was no national activity among the lawyers in regard to the process of legal education that is worth mentioning. The transformation of the average of facilities for legal training in the sixteen years since 1921 is startling, but there are still some states and some schools where conditions remain as primitive as they were when the Jacksonian Period had done its work, a century ago, of destroying what little hurdles there were to entry to the bar.

"Meantime also a new sort of problem has arisen to contribute variety. The metropolitan night school has gathered vast enrollments. Twelve or thirteen thousand students are attending these institutions. The night school is a natural offshoot of the spread of machinery for adult and wage-earners education, as it seems to the writer, but it undertakes to give training for the bar under conditions which have no precedent in our experience."

Following this description, he then points out the essentials for a good law school and the relation of the standards of the American Bar Association and the Articles of the Association of American Law Schools to these essentials.

In addition, the Review contains a table showing requirements for admission to the bar in every state, and a complete list of American law schools with information concerning their entrance requirements, attendance, fees, etc.

The Review, edited by Will Shafroth, adviser to the Council of the Legal Edution Section, is printed in a neat pamphlet of 80 pages. In addition to the material referred to, it contains a number of tables in reference to law school attendance for 1936 and past years. A copy will be sent without charge on request to the Association's headquarters in Chicago.

Legal Education Council Meets

THE Council on Legal Education and Admissions to the Bar of the American Bar Association met at the Mayflower Hotel in Washington on May 5. The University of Santa Clara College of Law at Santa Clara, California, was provisionally approved and the Wake Forest College School of Law at Wake Forest, N. C., the Loyola University School of Law at Los Angeles, California, the University of San Francisco Law School at San Francisco, California, and the Fordham University School of Law in New York were fully approved. These last four schools had previously had the status of provisional approval.

This makes a total of ninety-five approved schools, exactly half of the total number of schools listed in the latest Annual Review of Legal Education. These approved schools contain 55 per cent of the total law school enrollment during the current school year.

The report of the Adviser to the Council showed that thirty-three states at the present time have a requirement of two years of college education or its equivalent for bar admission, which in some cases is effective in the future. The action of the State Bar of Arizona, at its annual meeting on April 30, in directing its Board of Governors to recommend to the Supreme Court the adoption of a requirement of graduation from a law school approved by the American Bar Association, as a qualification for bar admission, was also announced. Efforts to bring about the adoption of the Bar Association Standards was also reported as going forward in half a dozen other states.

A report made by the Adviser in reference to present activities in the realm of post-admission legal education was discussed and recommendations will be contained in the annual report of the Council to the Section and will form the subject of discussion at the next Section meeting to be held in Kansas City.

Meeting of Board of Governors

THE Board of Governors of the Association met at Washington, D. C., on May 3 and continued in session several days. Interim reports of various committees and sections were received and disposed of. Appointment of a committee to cooperate with the United States Constitution Sesqui-Centennial Commission was authorized. The Committee on Law Lists presented a report of progress, setting forth certain proposals which it expects to make in its final report to be submitted to the House of Delegates, at Kansas City, and the Board approved the submission of such proposals.

The Committee appointed to select the winner in the Essay Contest under the Ross Bequest presented a report stating that Essay No. 39 had received the Award. This was the number attached to the Essay submitted by Mr. Elwood Hutcheson, of the Yakima, Washington, Bar. The subject submitted to the contestants was, "The Administration of Justice as Affected by Insecurity of Tenure of Judicial and Administrative Officers." The report was signed by Jesse C. Adkins, Henry Upson Sims and H. Claude Horack, chairman.

ELWOOD HUTCHESON
Yakima, Washington
Winner of Ross Bequest Award

Various matters connected with the current campaign in opposition to the pending Supreme Court proposal were discussed. Reports of officers were received and considered and other routine business transacted.

News of the Bar Associations

Arizona State Bar Directs Board of Governors, with Supreme Court's Approval, to Adopt Rule Raising Admission Requirements—Counsel's Recommendation As to Regulation of Practice, Etc.

THE Annual Meeting of the State Bar of Arizona was held in the Court Room of the Superior Court at Tucson, Arizona, on the 30th day of April, 1937.

The ballots for the election of members of the Board of Governors for Districts No. 2 and 6 were canvassed and Alfred B. Carr was elected a member of the Board of Governors for District No. 2; Charles A. Carson, Jr., Lawrence L. Howe, Henry H. Miller and James E. Nelson of Phoenix and William H. Westover of Yuma were elected members of the Board of Governors for District No. 6.

The Board of Governors at its meeting held the same day, elected Henry H. Miller as President; Lawrence L. Howe as Treasurer, and James E. Nelson as Secretary. Mr. E. R. Byers of Williams and Francis M. Hartman of Tucson were elected Vice-Presidents.

The principal business coming before the meeting was the report of the Arizona Judicial Council who reported three findings and recommendations.

1. The Council found that there was considerable criticism of the Superior Court in taking matters under advisement and delaying decisions and that in Maricopa County, where there is a four-judge Court, there was a lack of co-ordination of the work between the four judges.

The Council recommended in these matters that the Supreme Court be requested to promulgate a rule requiring the Judges of the Superior Court to report monthly to the Supreme Court on matters under advisement and the length of time that such matters have been under consideration; that the judges of the Supreme Court call into conference with them the judges of the Superior Court for Maricopa County in order that a better system of co-ordination of the four judges of that Court be brought about and, if necessary, that the Supreme Court make a uniform rule providing for the proper distribution and expedition of the work in that County. The recommendation was adopted by an overwhelming vote.

2. The second finding was to the effect that the standards for education for admission to the bar in Arizona were too low. The Council reported.

"1. That those who apply to take the bar examinations in this state are required to have only a high school education and three years of law school study.

"2. That at present 33 of our 48 states require applicants for admission to the bar to have completed substantially two years of college work beyond high school in addition to three years of law school study.

"3. That during the calendar years 1934, 1935 and 1936, thirteen states ap-

HENRY H. MILLER
President, State Bar of Arizona

proved and adopted substantially the two year college requirement, among which were Texas, New Mexico, Utah, Nevada and Oregon.

"4. That California and Arizona are the only states in the Southwest having lower standards for admission to the bar. That in October, 1936, the members of the State Bar of California by a vote of 4312 to 364 favored raising the standards for admission to the bar of that state.

"5. That there is a tendency for those persons who cannot meet the higher standards for admission in their home states to seek admission to the bar in those states where the standards are lower; that evidence of such tendency is already apparent among those who are seeking to enter the bar of Arizona."

The Council recommended an increase in requirements for admission to the bar in Arizona and a resolution to that effect was adopted by a large majority. The resolution directed the Board of Governors, subject to the approval of the Supreme Court, to adopt a rule providing that, beginning with the first bar examination to be held in the year 1940, every candidate for admission must be a graduate of a school approved by the American Bar Association.

3. The third finding was to the effect that simplification was needed in procedural matters, and further, that in view of the impending uniform rules of procedure of the Federal Courts throughout the country the practice in the State Courts, should be made to show as near as may be the practice in the District Court, and the Council recommended that a bill be introduced in the next legislature authorizing the Supreme Court, by rule, to regulate pleading, practice and procedure in all the Courts of Arizona, and further provide that the statutes now existing relating to pleading and practice and procedure shall from the time such act takes effect have the force and effect only as rules of Court and shall remain in force and effect until modified or suspended by rules promulgated by the Supreme Court.

A banquet was held at the Santa Rita Hotel in the evening. Other social activities consisted of a bridge luncheon for the ladies, a luncheon for the visiting members of the State Bar by the Pima County Bar Association, and the annual golf tournament.

Florida State Bar Association Opposes Pending Federal Judiciary Bill by Vote of 121 to 37—Approves Proposed Criminal Code—Reaffirms Belief in Supreme Court's Power to Govern Admission, Etc.

THE Florida State Bar Association met in annual session at Coral Gables, Florida, on April 1, 2 and 3. The principal speakers before the convention were Frederick H. Stinchfield, President of the American Bar Association; Joseph D. Stecher, President of the Junior Section of the American Bar Association, and Dr. Luis Machado, prominent international lawyer of Havana, Cuba.

The Association went on record as opposing the Federal Judiciary Bill now before Congress by a vote of 121 to 37 and approved a proposed Criminal Code which has been introduced before the Legislature after more than two years' work by a special committee appointed by the Association for that purpose.

It also reaffirmed its belief that the Supreme Court of Florida had the power to promulgate rules to govern admission, educational qualifications and discipline of the members of the Bar. It now has pending before the Supreme Court a petition asking the Supreme Court to promulgate such rules for the government of the Bar of Florida. The Canons of Professional and Judicial Ethics of the American Bar Association were adopted.

MARTIN CARABALLO
President, Florida State Bar Association

Martin Caraballo of Tampa was elected President of the Association, succeeding Lewis Twyman, Miami, and Ed R. Bentley of Lakeland, who is also Editor of the Law Journal, was re-elected for the eighth time as Secretary-Treasurer. E. Dixie Beggs, Jr., Pensacola, was elected President of the Junior Bar Section, succeeding John Dickinson, St. Petersburg, and Harold Wahl was reelected Secretary-Treasurer.

Martin Caraballo, the new President of the Florida State Bar Association, was born in San Andres Tuxtla, Republic of Mexico, on April 18, 1887, and came to Tampa with his father, the late Dr. Martin Caraballo, in 1890, where he has continuously resided since.

He attended elementary schools from the ages of eight to eleven, at which time he had to leave school and go to work. He clerked in drug stores until he was fifteen and, having studied shorthand at nights, went to work for the old law firm of Macfarlane and Rainey of Tampa, where he remained until the age of eighteen. He then entered Washington and Lee University, from which he received his LL.B. degree in 1907 at the age of twenty. During these years he worked his way through college with photography, shorthand, teaching Spanish, selling clothes and playing the piano.

In 1907 Mr. Caraballo opened his own law office in Tampa, where he has since practiced. The new President has one hobby, to which he gives a great deal of time. He has a complete mechanical

workshop and has patented many inventions which have been worked out in his shop.

In 1920 Mr. Caraballo was elected President of the Hillsborough County Bar Association. He has served two years as a member of the Executive Council of the Florida State Bar Association. He has held a number of political offices, all of them without salary, such as delegate to the convention to repeal the 18th Amendment, delegate to the National Democratic Convention, Presidential Elector and a member of the Charter Board for the City of Tampa.

Illinois Annual Meeting Attracts Largest Attendance in Its History—President Trimble Pleads For Support of Prestige of Courts—President Stinchfield and Chairman Morris Deliver Addresses

THE sixty-first annual meeting of the Illinois State Bar association attracted the largest attendance in the history of the annual conventions of this association. The three-day session began Wednesday morning, May 19, and continued through Friday afternoon, May 21.

Wednesday afternoon brought the opening session of the convention proper, featuring reports of officers, the board of governors, and the various sections and committees. The secretary reported an active, membership of 5018 at the time of the meeting, placing the Illinois State Bar association in the front rank of the voluntary bar associations in point of membership.

Another interesting report presented at this time was the report of the treasurer showing the ways in which the five dollars annual membership fee paid by the members is distributed. These figures indicated that out of the five dollars paid by each member as annual dues, during the year 1936-1937, $2.45 was spent for maintenance of the Springfield office of the association, $0.95 for the publications of the association including the monthly Illinois Bar Journal, the 1936 Annual Report, and such pamphlets as the schedule of fees and charges; $0.80 for committee and section activities; $0.55 for the numerous meetings of lawyers held throughout the state; and $0.25 for traveling expenses of the officers and board of governors in administering the affairs of the association.

President Cairo A. Trimble, of Princeton, delivered his address at this session. Taking "Temples of Justice" as his theme, President Trimble voiced a strong plea for active support of members of the legal profession in maintaining the dignity and prestige of the courts of justice. Undignified conduct of jurists and lawyers tending to impair this continued dignity was severely criticized in this address, with particular emphasis upon the harmful effect of such conduct on popular impressions of the administration of justice in our courts. Dean Edwin D. Dickinson, of the School of Jurisprudence of the University of California, addressed the afternoon session on the subject of "The Neutrality of the United States."

JOHN F. VOIGT
President, Illinois State Bar Association

On Wednesday evening, the association tendered a dinner in honor of the local bar associations of the city of Chicago, at which time Rudolph A. Vasalle, of Chicago, president of the Chicago Council of Local Bar Associations, outlined the work of these organizations in the metropolitan area. Mr. Vasalle described the seven national and racial bar organizations in Chicago and detailed their constructive activities in attacking the problem of unauthorized practice of the law and current efforts on the part of these organizations to curb ambulance chasing in the Chicago area. Speaking for the Women's Bar Association of Illinois, President Elsa C. Beck, of Chicago, discussed the work of that group.

On Thursday morning the section organization of the association took charge of the general program, providing a series of discussion periods designed to bring the Illinois lawyers down to date on current trends and developments in the practice of the law. This feature was tried out at the 1936 annual meeting held in Peoria and proved so successful that it has been made a permanent part of the annual meeting program.

Opening the discussion periods, the section on law office management presented Ernest A. Grunsfeld, Jr., architect and designer of the new headquarters and lounging rooms of the Chicago Bar association, who outlined the general trend of office arrangement and decoration and presented a number of valuable suggestions on improvement of the appearance of the modern law office.

The section on legal education and admission to the bar next presented a symposium entitled "Today's Selective Process for Admission to the Bar," during which addresses were made by Dean William F. Clarke of DePaul University, James S. Handy, of Chicago, chairman of the Illinois State Board of Law Examiners, and William M. James, of Chicago, member of the first district's Committee on Character and Fitness. For the final discussion of the morning session, the section on professional relations presented Stanley B. Houck, Minneapolis, chairman of the American Bar association committee on unauthorized practice of the law, who discussed the work of his committee.

The afternoon session opened with the section on state statutes presenting Eugene E. Brossard, of Madison, Wisconsin, official revisor of statutes for the

state of Wisconsin. Mr. Brossard discussed the work of his office in undertaking and successfully completing a complete revision and reclassification of the statute law of that state, emphasizing the simplicity and clarity to be gained by such a logical rearrangement of the mass of statute law.

Logan Hay, of Springfield, a former president of the Illinois State Bar association, then discussed the present status of the proposed legislation regarding the federal supreme court. Mr. Hay prefaced his observations on the current conflict with a pertinent analysis of the conflict between Abraham Lincoln and the court, beginning with Lincoln's reactions to the Dred Scott decision and continuing down through the debates with Douglas, to Lincoln's appointments of members of the supreme court.

The section on taxation then presented Simeon E. Leland, chairman of the Illinois Tax Commission, who discussed the work of the Commission and current problems in Illinois tax legislation and procedure. A discussion of outstanding developments in corporation law, led by John C. Fitzgerald, Chicago, of the section on corporation law, concluded the afternoon session.

The annual banquet of the association, held on Thursday evening, was designated as "An Evening with the American Bar Association," in honor of the speakers who appeared on the program. Dean Edwin D. Dickinson responded briefly to his introduction, after which George M. Morris, of Washington, D. C., chairman of the American Bar Association House of Delegates, spoke of "The Bar on the March." He outlined briefly the development of organization within the legal profession, described the working organization of the American Bar Asgage foreclosures in Illinois. Charles M. Thomson, Chicago, president of the Chicago Bar association, then discussed the plan of judicial selection brought forward by the board of managers of that organization, on behalf of the section on public relations. Edgar B. Tolman, Chicago, a former president of the Illinois State Bar association, on behalf of the section on sociation, and pointed to the fact that now as never before the bar of America stands ready to march forward as a vital factor in the progress of government and the administration of justice.

Frederick H. Stinchfield, of Minneapolis, president of the American Bar Association, took up the theme of the marching bar of America and discussed the destination of this moving force in current affairs. President Stinchfield stressed the fact that the ultimate objectives of this movement must be dictated by concern for preservation of the highest ideals of personal liberty and security if the bar of America is to continue to command the increasing respect of the public generally.

Continuing the discussion sessions on Friday morning, the section on real property law presented Isaac S. Rothschild, of Chicago, who described the work of the committee of the Chicago Bar association in its studies of mortcivil practice and procedure, then discussed the present status of the proposed new rules of federal practice.

Concluding the morning program, Col. O. R. McGuire, of Arlington, Va., chairman of the American Bar Association committee on administrative law, discussed in detail the work of his committee in drafting a proposal for the creation of intra-departmental administrative courts to serve as a protection for the citizen against the spread of administrative powers vested in federal departments beyond the limits authorized by law. The Friday afternoon session was devoted to a discussion of present day investments of trust funds led by Probate Judge Benjamin S. DeBoice, of Springfield, on behalf of the section on probate and trust law.

The report of the tellers of the election concluded the convention on Friday afternoon. Officers elected for the coming year are: John F. Voigt, Chicago, president; William D. Knight, Rockford, first vice-president; Charles O. Rundall, Chicago, second vice-president; Dean Albert J. Harno, Urbana, third vice-president; R. Allan Stephens, Springfield, secretary; and Frank L. Trutter, Springfield, treasurer. Warren B. Buckley, Chicago, and Amos H. Robillard, Kankakee, were elected to the board of governors for terms expiring in 1940. State bar association delegates to the American Bar association House of Delegates elected at this time include Cairo A. Trimble, Princeton; Clarence W. Heyl, Peoria; and Harry N. Gottlieb, Chicago.

An unusual feature of this convention was the exhibition of law books and office supplies and equipment which was conducted throughout the three days of the meeting, in a hall adjacent to the meeting room. Twenty-one law publishers, printers and others were represented in this exhibit, with a model law office planned by the section on law office management as an attractive display. The American and Illinois State Bar associations, together with the Women's Bar Association of Illinois, joined in this exhibit.

R. ALLAN STEPHENS,
Secretary.

WANTED to buy American Bar Association Journals as follows: October, 1920; January, September and December, 1921; July, October and November, 1922; January, November and December, 1923; January, 1924; July, 1933; February and July, 1935. Will pay 25 cents each.

Write Journal office, 1140 N. Dearborn St., Chicago.

CRITICAL STAGE IN SUPREME COURT FIGHT

The Original Bill Has Been Shelved and the Immediate Effort Is to Pass Some Sort of "Compromise"—Full Text of Logan-Hatch-Ashurst Amendment Introduced as Substitute for the First Measure—Skillful Tacticians Are Relying on the Lull in Popular Protests and the Oppressive Mid-Summer Weather in Washington to Help Them Force Its Passage—Citizens Should Make Their Views Clear and Emphatic in Letters and Telegrams to Senators and Congressmen and, in Particular, to Members of the Judiciary and Rules Committees of the House

By Sylvester C. Smith, Jr.
Member of House of Delegates from New Jersey; Chairman of American Bar Association's Special Committee on Supreme Court Proposal

At the time of writing this further report to members of the Association and the profession as to the situation in the fight against re-making the Courts of the United States (July third), the indications are that the critical stage has arrived and that decisive action may take place in the very near future. The hot days of mid-summer are oppressive, in Washington and generally throughout the country. Many leaders of public opinion are on vacation or in vacation mood. As was to be expected, the volume and vehemence of the popular protests against re-making the Courts had largely abated, as the country concluded that the pending proposals were not likely to become law. Under such circumstances, the skillful tacticians supporting the bill are making vigorous efforts to pass it. The lines are being closely drawn, and the outcome must be regarded as altogether in doubt, unless public opinion is again rallied and is expressed as emphatically as it was last March and April. The *danger* is that a bill which could not have been passed *then* will be passed during the period of heat and vacations.

The *present* efforts in the Senate are not centered upon passing the original proposal of the Message of February 5, 1937, for adding six Justices (now five) to the Supreme Court. The immediate effort, in the Senate, is to pass some sort of a so-called "compromise" bill as to the Supreme Court, which will carry with it provisions for adding to the number of judges in the other Federal Courts and also enable the Supreme Court issue to be sent to conference, if the House of Representatives can be induced to pass some form of the original proposal as to the Supreme Court. Should such a situation be developed, a conference committee report, in August or early September, might re-present substantially the original proposal, or offer some modification of it, for the consideration of weary legislators.

THE LOGAN-HATCH-ASHURST BILL (S.1392)

On July 2nd, Senator Robinson of Arkansas placed before the Senate a bill (S. 1392), which was ordered to be printed but was not referred to the Committee on the Judiciary. In form it is a revision, in certain respects, of the original Ashurst-Maverick bill, and bears the same calendar number (S. 1392). The official print describes it as an

"Amendment intended to be proposed by Mr. Logan (for himself), Mr. Hatch, and Mr. Ashurst to the bill (S. 1392) to reorganize the judicial branch of the Government."

The text of the Logan-Hatch-Ashurst bill, in substitution for the original form of S. 1392, is hereinafter given.

Before any long debate starts upon such a "compromise" measure, a determined effort may be made, by opponents of re-making the Courts by legislation, to refer the "compromise" measure for consideration and report by the Judiciary Committee, on the ground that the "compromise" measure should be, but has not been, considered and reported on by the Senate Judiciary Committee, and on the ground that it held hearings and reported on the original bill. The effect and purpose of such a motion to recommit would be to postpone consideration of the whole matter, probably beyond the period of the present (first) session of the 75th Congress. This motion to recommit and postpone may bring the first test of voting strength between the friends and foes of the Court.

THE MAJORITY REPORT FROM THE JUDICIARY COMMITTEE

The outstanding event which has transpired since my *interim* report to the members of the American Bar Association, published in the June issue of The Journal, has been the report by ten members of the Senate Judiciary Committee, against the Ashurst-Maverick bill (S. 1392). This report was addressed to the original proposals of The President's Message of February 5, 1937, including the addition of not more than six Justices of the Supreme Court; but the underlying philosophy of the majority report is so broad and patriotic that it seems to me to condemn, in essential implications, any and all increase in the number of judges, under

present circumstances or for any such reasons as have been urged in behalf of re-making the Court at this time.

There has been no minority report, and my present understanding is that none will be filed. The majority report is, to me, the more impressive because it is manifestly the result of the hearings held by the Judiciary Committee and the testimony so effectively presented by a great number of earnest and patriotic citizens, and chiefly by lawyers and by teachers of law. The testimony in support of re-making the Court contributed to the result, along with the testimony in opposition. When the hearings started, a majority of the members of the Committee were pre-disposed to favor the Ashurst-Maverick bill; but the keen analyses of the measure, and the vigorous protests against it, by a procession of distinguished and disinterested witnesses, carried conviction to several open-minded members of the Committee. When the measure reaches the stage of debate and vote on the floor, it should be kept in mind that a majority of those who heard the open arguments for and against the bill were persuaded to report against it.

The report has been most favorably received, by the press and public. Its language is such as to clarify and dramatize the issues. I hope that lawyers and others interested will obtain a copy of the report, read it, and circulate it among their friends. Practically all of its arguments against adding six or five Justices to the Supreme Court are applicable, with equal validity and force, to the addition of any lesser number of Justices to the Supreme Court and to the proposed increases in the size of the other Federal Courts on the basis proposed. I quote from the report its own striking summary of the conclusions reached:

"We recommend the rejection of this bill as a needless, futile, and utterly dangerous abandonment of Constitutional principle.

"It was presented to the Congress in a most intricate form and for reasons that obscured its real purpose.

"It would not banish age from the bench nor abolish divided decisions.

"It would not affect the power of any Court to hold laws unconstitutional nor withdraw from any judge the authority to issue injunctions.

"It would not reduce the expense of litigation nor speed the decision of cases.

"It is a proposal without precedent and without justification.

"It would subjugate the Courts to the will of Congress and the President and thereby destroy the independence of the judiciary, the only certain shield of individual rights.

"It contains the germ of a system of centralized administration of law that would enable an executive so minded to send his judges into every judicial district in the land to sit in judgment on controversies between the government and the citizen.

"It points the way to the evasion of the Constitution and establishes the method whereby the people may be deprived of their right to pass upon all amendments of the fundamental law.

"It stands now before the country, acknowledged by its proponents as a plan to force judicial interpretation of the Constitution, a proposal that violates every sacred tradition of American democracy.

"Under the form of the Constitution it seeks to do that which is unconstitutional.

"Its ultimate operation would be to make this government one of men rather than one of law, and its practical operation would be to make the Constitution what the executive or legislative branches of the government choose to say it is—an interpretation to be changed with each change of administration.

"It is a measure which should be so emphatically rejected that its parallel will never again be presented to the free representatives of the free people of America."

SUGGESTED MEASURES FOR SO-CALLED "COMPROMISE"

At this writing, it seems probable that, from among the various proposals for the so-called "compromise," the Logan-Hatch-Ashurst revision of the original bill will be selected for present support by those who are unable to muster the necessary votes to carry the proposals of the message of February 5, 1937.

Senator Hatch of New Mexico was one of the signers of the majority report from the Judiciary Committee, and is understood to support staunchly its basic point of view as to the original proposals (S. 1392). At an earlier stage of the fight to save the Court, Senator Hatch sponsored a proposal which he deemed to be far less drastic and objectionable than the original proposal.

At page 24 of the official print of the majority report, Senator Hatch stated separately his "individual views," as follows:

"In filing this separate brief statement on S. 1392 it is not intended to depart in any degree from the recommendation of the majority report for the committee to the effect that S. 1392 should not pass. In that recommendation I join.

"It should be noted that the recommendation and the arguments advanced by the majority are directed against the bill in its present form. It has been my thought that the principal objections set forth in the majority report can be met by proper amendments to the bill; that with sufficient safeguards, it can be made a constructive piece of legislation, not designed for the immediate present, but to provide a permanent plan for the gradual and orderly infusion of new blood into the courts. Such a plan, intended to aid in the better administration of justice and to enable the courts to discharge their judicial function more efficiently, but so safeguarded that it cannot be used to change or control judicial opinions, is within both the spirit and the letter of the constitution.

"Intending to offer amendments which it is believed will accomplish this purpose. I desire to make this additional statement to accompany the majority report."

HISTORY OF THE HATCH AMENDMENT

Senator Hatch offered his amendments to S. 1392 on April 19th, and they were printed and referred to the Committee on the Judiciary. In behalf of some such "compromise" measure, it was urged that it would add only one Justice to the Court in any calendar year, might not in actual operation add any Justice to the Court, and would not in any event increase permanently the size of the Court beyond nine members. On the contrary, it has seemed clear to me, from the first,

that such a "compromise" would not be "a constructive piece of legislation" but would mean the triumph of the objectionable idea of remaking the Court through legislative action at the instance of the Executive, and would spell defeat for the vital principle of an independent Court. This form and method of so-called "compromise" is now actively supported by those whose objectives were so soundly condemned by the majority of the Judiciary Committee.

The *Washington Post* of June 29th quoted Senator Hatch as proposing to revise and supplement his amendments in minor respects, including an amendment to make the retirement age 75 years instead of 70 years. He was further quoted as seeking "a permanent Court of nine members under 75." In any event, it seems probable that the substance of the Hatch amendments, as embodied in the Hogan-Hatch-Ashurst bill (S. 1392), will become one of the battle-grounds in the Senate; and lawyers and other citizens ought promptly to let their views be known about it.

SCOPE OF THE LOGAN-HATCH-ASHURST BILL (S. 1392)

The Logan-Hatch-Ashurst amendments to the original bill (S. 1392) would enable the appointment of three Associate Justices to the Supreme Court within the next six months; viz., a successor to Mr. Justice Van Devanter, an "additional" Justice before the end of 1937, and another "additional" Justice in January or at any other time during 1938. Not more than one "additional" Justice can be appointed in any one calendar year. As to Justices of the Supreme Court, including the Chief Justice, the amendments would make the original plan for "additional" Justices operative at the age of 75 years (instead of 70 years), unless the Justice who reaches the age of 75 years retires. The age of 70 years as a basis for appointing "additional" Judges of Circuit, District and other Federal Courts is retained. The "additional" appointments to the Supreme Court and other Courts are not to be permanent; the Supreme Court is to be returned to its present size of nine members, through the appointment of no successors to Justices whose continuance on the Court beyond the age of 75 years leads to the appointment of "additional" Justices. Substantially the plan of the original bill is embodied in provisions for the appointment of an administrative proctor, the assignability of Circuit and District judges to other Circuits and districts without the consent of the senior judge, and the right of the Attorney-General to intervene and to take direct appeals in cases involving the constitutionality of Federal statutes.

The full text of the bill (S. 1392) as it would be changed by the Logan-Hatch-Ashurst amendments is:

AMENDMENT

Intended to be proposed by MR. LOGAN (for himself), MR. HATCH, and MR. ASHURST to the bill (S. 1392) to reorganize the judicial branch of the Government, viz:

Strike out all after the enacting clause and insert the following: Amendment in the nature of substitute to S. 1392 proposed by Mr. Logan (for himself), Mr. Hatch and Mr. Ashurst.

TITLE I

SEC. 1. Section 215 of the Judicial Code of the United States is hereby repealed and reenacted to read as follows:

"SEC. 215. The Supreme Court of the United States shall consist of a Chief Justice and eight associate justices, any six of whom shall constitute a quorum: *Provided, however,* The number of justices may be increased by the appointment of an additional justice in the manner now provided for the appointment of justices, for each justice, including the Chief Justice, who at the time of the nomination has reached the age of seventy-five years, but not more than one appointment of an additional justice as herein authorized shall be made in any calendar year: *Provided,* That the authority to appoint for any calendar year shall not lapse by reason of the rejection of the nomination, delay in confirmation, inability to nominate during an adjournment of the Senate or withdrawal of the nomination in a succeeding calendar year; and when such additional justice, or justices, shall have been so appointed no vacancy caused by the death, resignation, or retirement of a justice (except the Chief Justice) who has reached the age of seventy-five years, shall be filled, unless the filling of such vacancy is necessary to maintain at not less than nine the number of justices who have not reached the age of seventy-five. The number of appointments so made shall not, at any time, increase the total number of justices by more than two-thirds of the permanent membership of the court. If the number of members of the Supreme Court is in excess of nine not less than two-thirds of the membership shall constitute a quorum. As used in this section, the term 'justice' shall not include a justice who has retired from regular, active service."

SEC. 2. (a) An additional judge of any court of the United States other than the Supreme Court may be appointed, in the manner now provided by law, and to the same court, for each judge, appointed to hold his office during good behavior, who at the time of nomination of the additional judge has reached the age of seventy years.

(b) The number of judges of any such court shall be increased by the number appointed thereto under the provisions of subsection (a) of this section but no vacancy shall be created by the death, resignation, or retirement of a judge of such court (other than a chief justice) whose continuance in office has occasioned the appointment of an additional judge. No appointment shall be made under subsection (a) which at any one time would result in (1) more than twenty judges in regular active service, in addition to those otherwise authorized by law, or (2) an addition of more than two judges to the number otherwise authorized by law to be appointed to any circuit court of appeals, the Court of Claims, the United States Court of Customs and Patent Appeals, or the United States Customs Court, or (3) more than twice the number of judges otherwise authorized by law to be appointed for any district or, in the case of judges appointed for more than one district, for any such group of districts.

(c) Three-fifths of the judges of each of the following courts shall constitute a quorum thereof: The United States Court of Appeals for the District of Columbia, the Court of Claims, and the United States Court of Customs and Patent Appeals.

(d) An additional judge shall not be appointed under the provisions of this section when the judge who has reached the age of seventy years is commissioned to an office as to which Congress has provided that a vacancy shall not be filled.

SEC. 3. (a) Any Circuit Judge may be designated and

assigned from time to time by the Chief Justice of the United States for general service in the circuit court of appeals for any circuit. Any district judge may be designated and assigned from time to time by the Chief Justice of the United States for general service in any district court, or, subject to the authority of the Chief Justice, by the senior circuit judge of his circuit for service in any district court within the circuit. A district judge designated and assigned to another district hereunder may hold court separately and at the same time as the district judge in such district. All designations and assignments made hereunder shall be filed in the office of the clerk and entered on the minutes of both the court from and to which a judge is designated and assigned, and thereafter the judge so designated and assigned shall be authorized to discharge all the judicial duties (except the power of appointment to a statutory position or of permanent designation of a newspaper or depository of funds) of a judge of the court to which he is designated and assigned. The designation and assignment of a judge shall not impair his authority to perform such judicial duties of the court to which he was commissioned as may be necessary, or appropriate. The designation and assignment of any judge may be terminated at any time by order of the Chief Justice or the senior circuit judge, as the case may be.

(b) After the designation and assignment of a judge by the Chief Justice, the senior circuit judge of the circuit in which such judge is commissioned may certify to the Chief Justice any consideration which such senior circuit judge believes to make advisable that the designated judge remain in or return for service in the court to which he was commissioned. If the Chief Justice deems the reasons sufficient he shall revoke, or designate the time of termination of, such designation and assignment.

(c) In case a trial or hearing has been entered upon but has not been concluded before the expiration of the period of service of a district judge designated and assigned hereunder, the period of service shall, unless terminated under the provisions of subsection (a) of this section, be deemed to be extended until the trial or hearing has been concluded. Any designated and assigned district judge who has held court in another district than his own shall have power, notwithstanding his absence from such district and the expiration of any time limit in his designation, to decide all matters which have been submitted to him within such district, to decide motions for new trials, settle bills of exceptions, certify or authenticate narratives of testimony, or perform any other act required by law or the rules to be performed in order to prepare any case so tried by him for review in an appellate court; and his action thereon in writing filed with the clerk of the court where the trial or hearing was had shall be as valid as if such action had been taken by him within that district and within the period of his designation. Any designated and assigned circuit judge who has sat on another court than his own shall have power, notwithstanding the expiration of any time limit in his designation, to participate in the decision of all matters submitted to the court while he was sitting and to perform or participate in any Act appropriate to the disposition or review of matters submitted while he was sitting on such court, and his action thereon shall be as valid as if it had been taken while sitting on such court and within the period of his designation.

(d) When any Judge is assigned to duty outside of his District or Circuit his subsistence allowance shall be ten dollars per diem.

SEC. 4. (a) The Supreme Court shall have power to appoint a Proctor. It shall be his duty (1) to obtain and, if deemed by the Court to be desirable, to publish information as to the volume, character, and status of litigation in the district courts and circuit courts of appeals, and such

MEMBERS OF THE JUDICIARY COMMITTEE OF THE SENATE

Henry F. Ashurst, Arizona, *Chairman;*
William H. King, Utah;
M. M. Neely, West Virginia;
Patrick A. McCarran, Nevada;
Frederick Van Nuys, Indiana;
M. M. Logan, Kentucky;
William H. Dieterich, Illinois;
George McGill, Kansas;
James H. Hughes, Delaware;
Frederick Steiwer, Oregon;
Carl W. Hatch, New Mexico;
Edward R. Burke, Nebraska;
Key Pittman, Nevada;
Tom Connally, Texas;
Joseph C. O'Mahoney, Wyoming;
William E. Borah, Idaho;
George W. Norris, Nebraska;
Warren R. Austin, Vermont.

MEMBERS OF THE RULES COMMITTEE OF THE HOUSE OF REPRESENTATIVES

John J. O'Connor, New York, *Chairman;*
Adolph J. Sabath, Illinois;
Arthur E. Greenwood, Indiana;
E. E. Cox, Georgia;
William J. Driver, Arkansas;
Howard W. Smith, Virginia;
J. Bayard Clark, North Carolina;
Martin Dies, Texas;
Byron B. Harlan, Ohio;
Lawrence Lewis, Colorado;
Joseph W. Martin, Jr., Massachusetts;
Carl E. Mapes, Michigan;
J. Will Taylor, Tennessee;
Donald H. McLean, New Jersey.

MEMBERS OF THE JUDICIARY COMMITTEE OF THE HOUSE OF REPRESENTATIVES

Hatton W. Sumners, Texas, *Chairman;*
Andrew J. Montague, Virginia;
Emmanuel Celler, New York;
Zebulon Weaver, North Carolina;
John E. Miller, Arkansas;
Arthur D. Healey, Massachusetts;
Robert L. Ramsay, West Virginia;
Francis E. Walter, Pennsylvania;
Walter Chandler, Tennessee;
Charles E. McLaughlin, Nebraska;
William M. Citron, Connecticut;
Sam Hobbs, Alabama;
Abe Murdock, Utah;
John H. Tolan, California;
Edward W. Creal, Kentucky;
Robert P. Hill, Okahoma;
William T. Byrne, New York;
George D. O'Brien, Michigan;
Frank W. Towey, Jr., New Jersey;
U. S. Guyer, Kansas;
Clarence E. Hancock, New York;
Earl C. Michener, Michigan;
John M. Robsion, Kentucky;
Chauncey W. Reed, Illinois;
John W. Gwynne, Iowa.

other information as the Supreme Court may from time to time require by order, and it shall be the duty of any judge, clerk, or marshal of any court of the United States promptly to furnish such information as may be required by the Proctor; (2) to investigate the need of assigning district and circuit judges to other courts and to make recommendations thereon to the Chief Justice; (3) to recommend, with the approval of the Chief Justice, to any court of the United States methods for expediting cases pending on its dockets; and (4) to perform such other duties consistent with his office as the court shall direct.

(b) The Proctor shall, by requisition upon the Public Printer, have any necessary printing and binding done at the Government Printing Office and authority is conferred upon the Public Printer to do such printing and binding.

(c) The salary of the Proctor shall be $10,000 per annum, payable out of the Treasury in monthly installments, which shall be in full compensation for the services required by law. He shall also be allowed, in the discretion of the Chief Justice, stationery, supplies, travel expenses, equipment, necessary professional and clerical assistance, and miscellaneous expenses appropriate for performing the duties imposed by this section. The expenses in connection with the maintenance of his office shall be paid from the appropriation of the Supreme Court of the United States.

SEC. 5. There is hereby authorized to be appropriated such sums as are necessary to carry out the provisions of this Act.

SEC. 6. When used in this Act—

(a) The term "circuit court of appeals" includes the United States Court of Appeals for the District of Columbia; the term "senior circuit judge" includes the chief justice of the United States Court of Appeals for the District of Columbia; and the term "circuit" includes the District of Columbia.

(b) The term "district court" includes the District Court of the District of Columbia but does not include the district court in any Territory or insular possession.

(c) The term "judge" includes justice and the term "chief justice" shall include the presiding judge of the United States Court of Customs and Patent Appeals.

TITLE II

SEC. 101. Whenever in any court of the United States in any suit or proceeding to which the United States or any agency thereof or any officer or employee thereof, as such officer or employee, is not a party, the constitutionality of any statute of the United States is drawn in question, the court having jurisdiction of the suit or proceeding shall certify such fact to the Attorney General if the court is of opinion that a substantial ground exists for questioning the constitutionality of the statute. The court shall afford the United States an opportunity for presentation of evidence (if evidence is otherwise receivable in such suit or proceeding) and argument. In the suit or proceeding the United States shall, subject to the applicable provisions of law, have the same rights as a party to the extent necessary for a proper presentation of the facts and law relating to the constitutionality of the statute and shall have the right to become a party to such proceeding, case, or controversy.

SEC. 102. Whenever any judgment, decree, or order in any suit or proceeding referred to in section 101 is based in whole or in part upon a decision that any statute of the United States is unconstitutional as therein applied, the United States, irrespective of whether or not it had previously presented evidence or argument under the provisions of section 101 shall have the same right to appeal therefrom as any party to the suit or proceeding. Within sixty days after the entry of any such judgment, decree, or order, whether final or interlocutory, the United States may also appeal therefrom directly to the Supreme Court, in which event any appeal or cross-appeal therefrom by any party to the suit or proceeding taken previously or taken within sixty days after notice of the appeal by the United States shall also be treated as taken directly to the Supreme Court. Such appeals to the Supreme Court shall, on motion of the United States, be advanced to a speedy hearing. This section shall not confer upon the United States any right of review by the Supreme Court unless a party to the suit or proceeding also takes an appeal.

SEC. 103. Within sixty days after the entry of any judgment, decree, or order referred to in section 102, the United States, irrespective of whether or not it had previously presented evidence or argument under the provisions of section 101, may appeal therefrom directly to the Supreme Court. Such appeals will lie if no appeal is taken by any party to the suit or proceeding and such appeals shall, on motion of the United States, be advanced to a speedy hearing. If the United States appeals to the Supreme Court under the provisions of section 102, but no appeal is taken by any party to the suit or proceeding, the appeal of the United States shall be regarded as an appeal under this section. If this section, or any provision thereof, is held invalid, the remainder of this Act and the other provisions of this section shall not be affected thereby.

SEC. 104. In any suit or proceeding in any court of the United States to which the United States or any agency thereof or any officer or employee thereof, as such officer or employee, is a party, in which the decision is against the constitutionality of any statute of the United States, the United States, within sixty days after the entry of a final or interlocutory judgment, decree, or order, may, in its discretion, in its own name or in the name of such agency, officer, or employee, as the case may be, appeal therefrom directly to the Supreme Court, in which event any appeal or cross appeal by any party to the suit or proceeding taken previously or taken within sixty days after notice of the appeal by the United States shall also be or be treated as taken directly to the Supreme Court. Such appeals shall, on motion of the United States, be advanced to a speedy hearing. This section shall not apply to any judgment, decree, or order of a district court of the United States which may, under existing provisions of law, be appealed directly to the Supreme Court.

SEC. 105. The Attorney General is authorized by himself or by counsel designated by him, to appear and argue in cases described in section 101, and to invoke appellate jurisdiction in cases described in sections 102, 103, and 104.

SEC. 106. As used in this title, the term "court of the United States" means the courts of record of Alaska, Hawaii, and Puerto Rico, the Customs Court, the Court of Customs and Patent Apeals, the Court of Claims, the District Court of the United States for the District of Columbia, any district court of the United States, the United States Court of Appeals for the District of Columbia, any circuit court of appeals, and the Supreme Court.

SEC. 107. If any provision of this title, or the application thereof to any person or circumstances, is held invalid, the remainder of the Act and the application of such provisions to other persons or circumstances shall not be affected thereby.

THE ANDREWS RESOLUTION FOR A CONSTITUTIONAL AMENDMENT

Various other amendments and proposals have been offered by members of the Senate and House, at earlier stages of the controversy; and it would be venturesome to forecast whether any or many of these will emerge for serious legislative consideration.

Senator Andrews of Florida introduced on May

(*Continued on page* 559)

Scenes in Kansas City, Where Annual Meeting Will Be Held

ANDERSON PHOTO

JACKSON COUNTY COURT HOUSE

ANDERSON PHOTO

NELSON GALLERY of ART AND MARY ATKINS MUSEUM

MUNICIPAL AUDITORIUM

HARKINS PHOTO

SCENE IN A PUBLIC PARK

TYNER MURPHY PHOTO

PETTICOAT LANE (11TH ST.)

ANDERSON PHOTO

KANSAS CITY: HOST FOR THE APPROACHING SIXTIETH ANNUAL MEETING OF THE AMERICAN BAR ASSOCIATION

A City Whose Solid Achievements Are Built on the Firm Foundations of Early Pioneer Energy, Later Business Enterprise, and the Growth of Agriculture, Transportation and Modern Industry—Has Lowest Percentage of Foreign Population of Any City in America—A Great Modern Distributing Center—A Starting Point for History—Third Largest Railway Terminal in the World—An Industrial and Agricultural Capital—An Artistic and Cultural Center—Remarkable Art Gallery and Museum—A Magnificent Out-of-Doors for Visitors—Commercial Monuments—Beautiful Homes—Ample Housing Accommodations—Six Thousand Hosts and Guides for American Bar Association Visitors

NESTLED among the rugged bluffs at the junction of the Kaw and Missouri Rivers is a city of solid character, whose growth has depended on agriculture, transportation and modern industry. As the site for the sixtieth annual meeting of the American Bar Association, September 27th to October 1st, Kansas City, Missouri, possesses a strategic location. This same factor, coupled with the great energy of the Western pioneers, contributed to its early growth. Though a comparative youth among cities, you will meet in Kansas City former home-folks, for here in almost the exact geographical center of the United States, the North, South, East and West have gathered to found a great distributing center, which today is a typically American city, with the lowest percentage of foreign population of any city in America. Visitors will sense its freshness and youth, and something of the spirit of adventure which contributed so much to its early development.

A Great Modern Distributing Center

From the earliest records of Indian trading from Chouteau's Warehouse in 1808 to its growth into a modern distributing center embracing more than 600,000 people, transportation has been a prime contributing factor in Kansas City's progress. In the middle of the 19th century Westport Landing was christened in derision by her larger rivals, Independence and Leavenworth, a muddy but ever bustling and energetic little river town, with all trade centered on the levee. Even after formal incorporation in 1853 Kansas Citians were much more interested in selling bacon sides and getting the wagon caravans out on time than in paving streets or watching the architecture.

Continued growth was dependent upon ease of transportation. At Westport Landing steamboats and river freighters coming from the East by way of St. Louis attained a maximum haul on the Missouri River. Labored wagon transportation was reduced to a minimum by loading cargo by way of the youthful Kansas City. Necessary supplies and equipment for settlement of the great southwest were loaded on wagon caravans, driven by eight span mules, and at this point began their long journey over the historic Santa Fe trail, and into the southwest.

A Starting Point for History

As the extreme western point of civilization prior to the Civil War, little "Westport Landing" had its part in outfitting many of history's most fascinating characters. It was here that Doniphan of Mexican War fame began the historic foot march with his soldiers to Santa Fé, New Mexico. Kit Carson left here to explore the West, finally joining with Fremont in the capture of California. The immortal Jim Bridger, whose explorations led to the discovery of Yellowstone National Park, outfitted his caravan from busy Westport. The Forty-Niners, bent on securing a share of California's new-found gold, gave little Westport an added importance, and developed a thriving business in providing canned goods, blankets, bacon sides and other necessary supplies. Prior to the Civil War, U. S. Grant, W. T. Sherman, Phil Sheridan, Robert E. Lee, Jefferson Davis, and other soldiers both North and South were stationed at Ft. Leavenworth, the oldest western army post, located within twenty miles of the present Kansas City. During the Civil War border warfare caused the formation of guerrilla bands, which led to the notorious Quantrell raids in which the James and Younger brothers played a part.

When the great "iron-horse"—the railroad—began to extend its network to the west, Kansas Citians were the first to subscribe necessary funds and secure Congressional aid in erecting the first bridge across the Missouri River.

Though construction of a bridge in present-day living would seem an unimportant event, completion of the "Hannibal Bridge" in July, 1869, spelled the beginning of Kansas City's services as a railway terminal by permitting easy interchange of rail traffic.

Third Largest Railway Terminal in World

This traffic today makes Kansas City's Union Station the third largest terminal in the world, cov-

ering some fifteen acres. Services of twelve trunk line railroads and some thirty-two subsidiary lines radiate to every principal city in the United States.

Because Kansas City today still recognizes the importance of its location in almost the exact center of the United States, rail services are supplemented by two conveniently located airports, both within fifteen minutes ride of downtown Kansas City. These include Fairfax, the Department of Commerce Engineering base, and Municipal, headquarters base for Braniff, Transcontinental and Western Air and division base for United Airlines.

For those who prefer to utilize the family car or truck, a network of paved transcontinental highways is available for the motorist whether he travels from north, south, east or west.

Long before the days of paved roads, streamlining or air-travel, men with high-heel boots, ten-gallon hats and clicking spurs were driving great herds of long horn cattle to Kansas City markets—markets which have now become well-known for breeded cattle exhibited each fall in the American Royal livestock show.

An Industrial and Agricultural Center

Here, close to the source of production, visitors may enjoy famous "sizzling Kansas City steaks" produced in the country's major packing plants, which are second only to those of Chicago. Here vast fields of golden wheat are harvested and transported to mid-western elevators for store and milling. These fields have earned Kansas City its reputation as the nation's bread-basket and world's leading market for primary winter wheat.

Long recognized as an agricultural center, the industrialist soon added his tribute to Kansas City. Sprawling pipelines were extended from Kansas, Oklahoma and Texas to bring crude petroleum for refining, manufacture of corn products was a natural outgrowth, and soap and paint and varnish manufacturers selected Kansas City until 875 establishments are represented in the Kansas City skyline. Today, long auto assembly lines must be kept moving, and blast furnaces kept hot for molten steel.

To provide recreation and diversion for these people, such early builders as the late August R. Meyer, William Rockhill Nelson, and George Kessler planned and developed the now famous Kansas City Park and boulevard system—a system which includes Cliff Drive, inviting Penn Valley Park, the 1,400 acre Swope Park, and winding drives of Country Club Residential district.

An Artistic and Cultural Center

More recently, under a $32,000,000 Ten-Year Plan for Public improvement indorsed in 1932, Kansas City has assumed its obligation as the artistic and cultural center of the great midwestern area it serves. Evidence might be found in the ready support given the Kansas City Philharmonic Orchestra, in the William Rockhill Nelson Gallery of Art and Mary Atkins Museum or in any of the recently completed new Municipal buildings, the Jackson County Court House, Federal Post Office, Municipal Auditorium or towering thirty story City Hall.

This is the modern Kansas City—the Kansas City which will be host to members of the American Bar Association. Representing the composite characteristics of those who live and work here, the visitor is at once impressed with its distinction and charm—large enough to be classed as metropolitan, yet entirely lacking in that terrific strain which is so prevalent in many of our larger cities.

Here in the midwest delegates may link professional interests with sheer good fellowship and entertainment and find in Kansas City much to satisfy the varied tastes of the entire membership.

A Magnificent Out-of-Doors

Coming as the convention does, at the height of Kansas City's fall season, the out-of-doors will prove particularly inviting and more than one hundred miles of beautifully landscaped drives await exploration.

Restful Penn Valley, to the south—home of "The Scout" and A. Phimster Proctor's sculptural group, "The Pioneer Mother"— forms a picturesque link between down-town Kansas City and its outlying shopping areas.

Cliff Drive to the northeast of the city retains the natural scenic beauty and charm of a winding drive through the mountains, with Budd Park inviting relaxation and an occasional distant view of Kansas City's skyline serving as a reminder of mid-western enterprise.

When seen after night, the Liberty Memorial is a sight of majestic power, and a bevy of blue lights directed on a series of fountains present a kaleidoscopic picture of mystical beauty with all Kansas City's skyline unfolding when viewed from this 537 foot height. All this, however, is in sharp contrast to the wealth of war trophies, weapons, communications and factual information contained within the memorial — a collection which merits several hours of browsing.

Ample opportunity for outdoor sports is afforded in Kansas City's Swope Park—the third largest municipal playground in the world. Its 1,400 acres of rustic woodland, three golf courses, tennis courts, picnic grounds, shelter houses, natural footpaths, outdoor animal pits, zoo and lagoon for swimming and boating afford interest and entertainment for groups of all ages and tastes.

A City of Beautiful Homes

It has been said that the index to any city may be found in its homes. If this is true, a few hours spent in exploring Kansas City's Country Club District justifies its claim to the most important high-type residential development in the world, and the largest contiguous restricted district in the United States.

Served by the Country Club Plaza, ever seasonable and festive in its decoration and Spanish in its architecture, this outlying shopping area constitutes a complete and beautiful miniature city in itself served by its own residential parks, golf courses, playgrounds and shopping centers.

As developer of Kansas City's Country Club District, J. C. Nichols was among the first in the United States to recognize the importance of residential restrictions. Imbued with the idea of making a home a sound business investment, Mr. Nichols found it necessary to operate on a basis of large scale planning. His Country Club residential section now serves more than 150,000 home-owning Kansas Citians, and as a member of the National Planning Commission under Presidents Coolidge,

Harding and Roosevelt, his recognition has extended far beyond Kansas City.

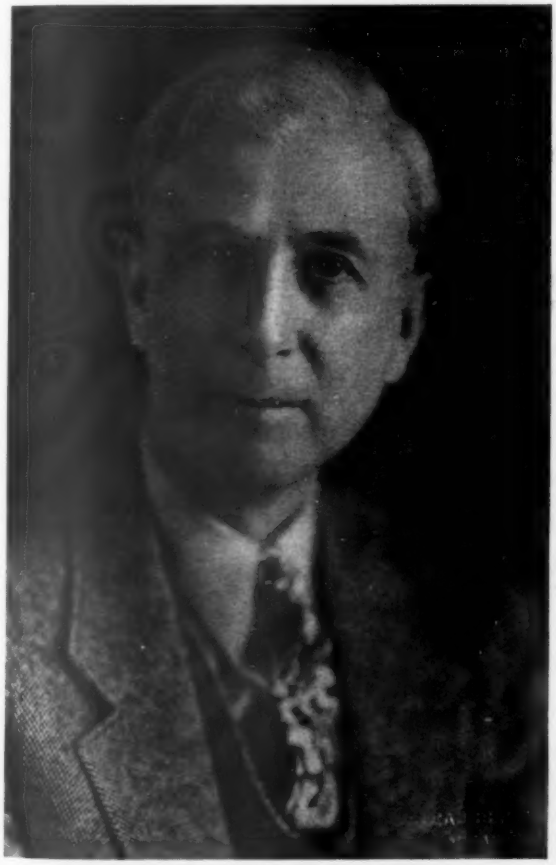
Those with cultural interests will want to explore the building and grounds of Kansas City's rapidly growing five-year-old University of Kansas City, and feast their minds on the spacious grounds and classic architecture of the William Rockhill Nelson Gallery of Art and Mary Atkins Museum.

Remarkable Art Gallery and Museum

Made possible by the bequests of Mary Atkins and William Rockhill Nelson, founder of the Kansas City Star, the Gallery is erected on the grounds of Mr. Nelson's former residence, Oak Hall, and the dignity and scientific construction of the building itself bespeak the wide variety and tremendous value of the rapidly growing collection within.

More than 5,000 objects of art from the earliest civilization of Asia Minor to contemporary 20th century art are exhibited. A distinctive feature is the installation of original old Panelings with complete furnishings of the period. These include an English Georgian drawing room, a French Regina Salon, a Spanish Italian room and an American Wing of five interiors brought from various sections of the Atlantic coast.

The department of paintings already ranks fifth among museums of the United States and includes outstanding works by Titian, Tintoretto, Veronese, Rembrandt, Rubens, Hals, El Greco, Velasquez, Goya, Poussin, Chardin, Boucher, Greuze, Millet, Gainsborough, Reynolds, Raeburn, Copley, West, Stuart and Inness.



HON. JOHN T. BARKER

The classical collection contains outstanding sculpture, bronze and pottery from Egypt, Greece, and Rome, and the Egyptian Hawk, Greek Lion and Statue of Roman Patrician are almost unique in America. The department of the Near and Far East contains treasures from Persia, India, China and Japan that cannot be duplicated in the United States.

Gone is the idea of a museum as a sort of morgue filled with dim and gloomy objects out of the past. Instead the air-conditioned, scientifically lighted Kansas City gallery achieves the effect of a series of small intimate rooms with art objects appropriately grouped as they typify life in that particular period. All this however is but a tribute to Kansas City's commercial interests.

Commercial Monuments of City

Downtown Kansas City with its famous retail shopping district, "Petticoat Lane", its new City Hall, Jackson County Court House, Post Office, Power and Light Building, broadcasting stations and Municipal Auditorium, bespeaks its commercial importance.

In utilizing the Kansas City Municipal Auditorium the American Bar Association will be among the first to move into one of the most modern convention buildings in the United States. Constructed at a cost of $6,500,000, the auditorium comprises 32 separate units ranging in seating capacities from 25 to 14,000. All of these may be closely linked together however by means of a public address system, and a huge mechanical giant—the third largest air-conditioning plant in the country—insures proper temperatures regardless of outside weather conditions.

Combining beauty and utility, the four principal units—the Main Arena, Music Hall, Little Theater and Exposition Area—make effective use of color and indirect lighting.

As a center for national conventions, trade shows and expositions, public mass meetings, athletic events, symphony concerts, musical productions and theatricals, the new auditorium has already "sold itself" to resident Kansas Citians and promises to afford the most complete and convenient facilities for members of the A. B. A.

Within a block of the Municipal Auditorium is the Kansas City Power and Light Building. Here may be found the Lighting Institute with innumerable devices for testing and meeting the varied requirements of the human eye. Here also are the television laboratories. Special studies have been made of color effects with special reference to visibility. Visitors are welcome at any time and will be furnished a guide between the hours of 9 a. m. and 3 p. m.

Both KMBC, member station of Columbia broadcasting, and WDAF, home of the Kansas City Star and member of the National network, welcome visitors at any time and initiate their guests into a few of the intricacies of various control rooms, while witnessing behind heavy plate glass a familiar favorite program.

The Kansas City Star couples such a visit with an inspection tour of its newspaper plant, causing its nation-wide readers to return home with an increased appreciation of the tremendous effort and

great sensitivity which go into the making of a great metropolitan newspaper.

Six Thousand Hosts and Guides

Guides and hosts for all this activity are the nearly six thousand members of the Missouri Bar Association, The Kansas City Bar Association, and The Lawyers' Association of Kansas City. They stand ready to prove that Kansas City is indeed the heart of America, most hospitable city in the United States.

To know, or thoroughly get the feel of a modern city, takes years. No convention delegate can hope thoroughly to acquaint himself in a brief visit of a few days, for in the shifting skyline of a modern city is found the tangible evidence of prosperity and triumph, of epidemics and despair. In order that delegates to the American Bar Association may make the most of their brief visit to Kansas City, the following is presented not as superlative "booster literature", but as necessary background from those of us who live and work here.

Housing Accommodations for Visitors

First concern of any visitor is its housing accommodations. While Kansas City boasts of no single large hotel comparable to the Stevens in Chicago or the Waldorf-Astoria in New York, yet within three blocks of convention headquarters in the Municipal Auditorium, may be found eight or ten first-class hotels with approximately thirty-five hundred good hotel rooms. For those who prefer the beauty and quiet of residential hotels, Kansas City boasts of some of the finest in the United States within a fifteen minute ride from downtown Kansas City, and within the minimum taxi zone.

Beautiful Excelsior Springs, one of the outstanding water resorts of the United States, with its famous Elms Hotel, is only a thirty-five minute drive from Kansas City.

Delegates will find Kansas City an easy city in which to get about, and any one of the five downtown hotels will provide ample accommodations for luncheon and dinner meetings and other entertainment not centered in the new Kansas City Municipal Auditorium.

OUTLINE PROGRAM OF KANSAS CITY MEETING

SUNDAY, SEPTEMBER 26

Afternoon

Junior Bar Conference.

5:00 to 7:00 P. M.—Informal Reception for new members of the American Bar Association (joining since July 1, 1936), and other members attending an Association meeting for the first time.

MONDAY, SEPTEMBER 27

Morning

FIRST SESSION OF THE ASSEMBLY

Call to Order.
Addresses of Welcome.
Response in behalf of Association.
Annual Address by President of Association.
Offering of Resolutions for reference to Committee on Resolutions.
Nomination and election of five delegates from Assembly to House of Delegates.
Announcement of vacancies in office of State Delegate.
(Meetings of members of Association present from those States to fill such vacancies pending elections in 1938).

Afternoon

Opening Sessions of the following Sections of the Association:

Bar Organization Activities.
Judicial.
Real Property, Probate and Trust Law.

Meeting of the National Conference of Bar Examiners.

FIRST SESSION OF THE HOUSE OF DELEGATES

Call to Order.
Roll Call.
Report of Committee on Credentials and Admissions.
Action upon correction of Record.
Approval of Record.
Statement of Chairman of House of Delegates.
Reports of—
The Secretary
The Treasurer
The Board of Governors
Report of Committee on Rules and Calendar.
Offering of Resolutions for reference to Committee on Draft.
New Business.

Evening

6:30—Dinner of Association members under joint auspices of the Judicial Section and National Conference of Judicial Councils.

9:30—Reception by the President. Dancing.

TUESDAY, SEPTEMBER 28

Morning

Hearings before Resolutions Committee of the Assembly.

Meetings of the following Sections of the Association:

Bar Organization Activities (and Committee on Unauthorized Practice of the Law).
Criminal Law
Insurance Law
International and Comparative Law
Junior Bar Conference
Mineral Law
Municipal Law
Meeting of the National Conference of Bar Examiners.
Patent, Trademark and Copyright Law
Public Utility Law
Real Property, Probate and Trust Law

Noon

Group Luncheons.

KANSAS CITY LAWYERS ACTIVE IN PREPARING FOR ANNUAL MEETING

Afternoon

Meetings of the following Sections and Committees of the Association:

Bar Organization Activities (Round Tables)
Criminal Law
Federal Taxation
Insurance Law (Round Tables)
International and Comparative Law
Legal Education and Admissions to the Bar
Mineral Law (Round Tables)
Municipal Law
Patent, Trademark and Copyright Law
Public Utility Law
Real Property Division of Section

Evening

Section Dinners:

Criminal Law
Insurance Law
Patent, Trademark and Copyright Law
Public Utility Law

WEDNESDAY, SEPTEMBER 29

Morning

Meetings of the following Sections of the Association:

Bar Organization Activities
Insurance Law
International and Comparative Law
Junior Bar Conference (Breakfast)
Mineral Law
Meeting of the National Conference of Bar Examiners.
Real Property, Probate and Trust Law

"Open Forum" session under auspices of Standing Committee on Unauthorized Practice of the Law.

Noon

Group Luncheons.

Afternoon

Hearings before Resolutions Committee of the Assembly.

SECOND SESSION OF THE HOUSE OF DELEGATES

Reports of Standing and Special Committees of the Association.

Evening

SECOND SESSION OF THE ASSEMBLY

Presentation of Ross Bequest Prize Award to Elwood Hutcheson, Esq., Yakima, Washington.

Address by prominent speaker. (To be announced.

THURSDAY, SEPTEMBER 30

Morning

THIRD SESSION OF THE ASSEMBLY

Election of five Assembly Delegates.

Report of Committee on Resolutions.

Discussion of Rules of Civil Procedure for the District Courts of the United States and the Supreme Court of the District of Columbia.

Noon

Group Luncheons.

Afternoon

THIRD SESSION OF HOUSE OF DELEGATES

Report of Committees on:

Credentials and Admissions
Draft
Hearings
Rules and Calendar

Reports of Sections of the Association.

Report to House of Delegates as to Resolutions adopted by Assembly.

Voting by House of Delegates upon Resolutions adopted by Assembly.

Presentation of matters which any State or local Bar Association, or any affiliated organization of the legal profession, wishes to bring before the House of Delegates.

Presentation of matters which any Section or Standing or Special Committee of the Association wishes to bring before the House of Delegates.

Evening

HORSE SHOW

FRIDAY, SEPTEMBER 31

Morning

FOURTH SESSION OF THE HOUSE OF DELEGATES

Report of Committee on Draft.

Report of Committee on Hearings.

Report by Chairman of State Delegates as to nominations made by State Delegates for officers of the Association and members of the Board of Governors.

Report by Chairman of Board of Elections as to any other nominations.

Election of Officers and Members of the Board of Governors.

Afternoon

Luncheon of the Association.

(Speakers to be announced later.)

Presentation of newly elected officers and Members of the Board of Governors.

FOURTH SESSION OF THE ASSEMBLY

Reports of Special Committees on special matters for attention of the Assembly.

Report by Chairman of House of Delegates as to action of the House upon Resolutions adopted by the Assembly.

Action by the Assembly upon Resolutions adopted by Assembly but disapproved or modified by House of Delegates.

Unfinished Business.

New Business.

Evening

ANNUAL DINNER OF THE ASSOCIATION

(Speakers to be announced later.)

SATURDAY, OCTOBER 1

Morning

FIFTH SESSION OF THE HOUSE OF DELEGATES

Unfinished Business.

New Business.

Announcement of appointment of Committees of the House for 1937-1938.

Adjournment.

Information as to Hotel Accommodations to be found on Page 558

AGENCY SINCE THE RESTATEMENT

Cases Involving Agency Since the Publication of the Restatement Show Some Deepening of Emphasis in Places But No Significant Change of Approach—Three Groups of Cases Selected for Brief Mention Are Interesting, Respectively, for Disclosure of Judicial Technique, because of Uncertainty as to the Future of Rules, and as an Illustration of a Harmonious Interplay of Rules within and without the Agency Field—Distinction between Agency and Other Relations—Infant Principal—Property Acquired through a Fraudulent or Unauthorized Agent.

By Warren A. Seavey

Professor of Law in Harvard Law School; American Law Institute Reporter for Agency

THE reading of the many cases involving agency decided since the publication of the Restatement reveals little to excite surprise. As to most matters the subject has become static. Although there is some deepening of emphasis in places, as in the expanding area in which an employer is liable for the acts of a servant or contractor, there has been recently no significant change in approach. To my knowledge, no case in the last four years has taken direct issue with the Restatement, although a number of opinions in which it was not cited have reaffirmed previously expressed minority rules contrary to those stated in the Restatement. Nothing in the cases or in criticism leads me to suggest material changes in the substance of the Restatement, although experience shows that some of the Sections lack clarity and there are omissions upon matters which might profitably be dealt with.[1]

The great mass of cases needs no comment; they make obvious applications of principles or involve merely disputed questions of fact or the interpretation of conduct or of language. Nevertheless, there have been far more interesting cases than can even be mentioned in an article of this length; my choice is only between a thorough discussion of a very few cases and a brief mention of a larger but still very limited number. Choosing the latter alternative, I have selected three groups of cases each of which is interesting to me as a group for a different reason: the first because of its disclosure of judicial technique; the second because of the uncertainty as to the future of the rules; the third because it is an illustration of an harmonius interplay of rules within and without the agency field.

DISTINCTION BETWEEN AGENCY AND OTHER RELATIONS

I have often heard from persons who are impatient with legal conceptions the question: Why define the agency relation? Is this not merely an abstract conception to which no legal consequences attach? It may be answered that the courts have long been accustomed to a method of thought which leads them first to find a relation and then to attach legal consequences to it; whether or not it is logical to attach the same consequences to all relations which are found to be agency relations (since the bond binding a principal and an agent is much stronger in some cases than in others), it is a simple and hence a convenient method, as well as one which, on the whole, has probably made it possible to deal more justly with the generality of cases than if no category had been attempted. At any rate it is the method used by the courts. It may, therefore, be of some interest to consider the different situations dealt with by the courts in the last four years (the period since the Restatement was published) in which they have found it important to consider whether there was an agency relation. In summary, it may be said that the cases support the condition that the existence of the relation can be tested by ascertaining whether it was intended that one of the parties should be a fiduciary for the other, acting on his account and under his direction.[2]

The situation which raises the question as to the existence of the relation in its broadest form, as well as illustrating the consequences of finding it, is that created when creditors, fearing the finan-

1. The Restatement has been cited in the decisions of the courts of at least thirty-four states, in some of them very frequently. More than one hundred of its Sections have received approval; no court has cited it with disapproval. Most of the non-judicial comment, chiefly in law reviews, has agreed with its positions. The following disagreements have been noted: Professor Maurice H. Merrill, 12 Neb. L. Bull. 100, in an article entitled, "Election Between Agent and Undisclosed Principal," suggests that the Restatement position that a third person discovering the existence of a previously undisclosed principal should be required to elect between the principal and the agent is unfair, a view with which the agency group agreed although it felt bound to make its statement accord with the authorities. Professor Gustavus H. Robinson in 18 Corn. L. Q. 161, on "Ratification after Loss in Fire Insurance" disagreed with the Restatement's position in the first Tentative Draft denying the possibility of ratification after loss, a position subsequently modified. Professor Horace E. Whiteside, reviewing the Restatement in 19 Corn. L. Q. 349, criticised the method of distinguishing between the servant and the non-servant agent, a distinction which has been approved by many courts since, one of the clearest expositions being in Harrington v. H. D. Lee Mercantile Co., 97 Mont. 40, 33 Pac. (2) 553 (1934). The latest work on the entire agency field, American Jurisprudence, Vol. 2, quotes the Restatement extensively, its only substantial disagreement being its insistence, which it must be admitted is supported by decisions in some of the states, that apparent authority is only estoppel by another name (§ 104) and its denial, less supported by the authorities that an undisclosed principal may be liable for the unauthorized contract of an agent (§ 401).

2. Sections 12-14 of the Restatement indicate the tests.

cial collapse of a debtor, assume more or less control over his assets and business. Since Cox v. Hickman,[3] the fact that the creditors are to share the profits of the business to the extent of their interests does not cause them to be partners, and if they are satisfied with giving advice they do not become liable to new creditors even though in fact they become the direct beneficiaries of their attempt to secure solvency for the debtor. On the other hand, if they go beyond this and exact obedience from the debtor so that in effect they are operating the debtor's business, they may lose their immunity and become liable for the debts of the concern of which they now have become the masters.[4] There is the same risk of liability to a cestui que trust who reserves control over a trustee; if he has power to direct the trustee, he may find himself a principal and subject to liability upon the contracts made by the trustee.[5]

The "power of control" test has been used in the many cases distinguishing an agent, who sells goods for a principal, from a buyer who acts on his own account. The courts also sometimes use the passage of title as a test, finding that if the transferee acquired title to the goods, he was a buyer rather than an agent. It would appear, however, that the state of the legal title may be unimportant or that, like the power of control, it may be merely a factor in determining whether the transferee is a fiduciary with a duty primarily of protecting the interests of the transferor in the transactions it is proposed that he shall perform or whether he is a person who has a contract of purchase, the subsequent transactions to be on his own account.

The determination that a relation was one of agency or one of sale has been important, not only in deciding whether the transferor was a party to a subsequent transaction entered into by the transferee, but also in deciding whether the court had jurisdiction;[6] whether the transferor was engaged in intra-state business through sales by the transferee;[7] whether an indemnity policy covered the conduct of the alleged servant,[8] and whether the transferor could control the resale price.[9]

In all cases it is quite clear that neither the name by which the parties describe the relation nor the belief of the parties that the transaction is either a sale or an agency is determinative.[10] In this connection the stockbroker cases are interesting since a person describing himself as broker may act either as an agent or as a buyer or seller and it is unfortunate to classify brokers as being within one or the other category. Thus, although Massachusetts, differing from most states, holds that for most purposes the broker is not treated as an agent,[11] yet it holds that he is a fiduciary who has a duty not to sell his own shares to his client without the latter's knowledge.[12] On the other hand, if, by agreement, he is to buy at any price he chooses, and is to sell to the client at a fixed price without charging commission, the fiduciary element is lacking and he should be considered a seller.[13]

Where it must be decided which of two persons is the principal of one transacting business between them, the courts use the same tests. It is frequently stated in an agreement that an intermediary shall be the agent of a specified one of the parties. This statement is only one of many factors; the courts' endeavor is to find to which person the intermediary owes primary allegiance in the particular transaction. Where an agent is regularly employed by one, the courts will view with suspicion a statement that he is the agent of the other, but this suspicion may be overcome. The question has arisen in determining whether a "customers' man" in a brokerage office was the agent of the customer or of the broker when he bought shares for the customer in violation of orders;[14] whether the solicitor of an insurance company was acting for the insurer or for the insured in writing answers in an application for insurance;[15] whether the treasurer of a local lodge was the agent of its members or of the grand lodge with reference to

3. 8 H. L. Cas. 268 (1860).

4. See the discussion in Commercial Credit Co. v. L. A. Benson Co., Inc., 170 Md. 270, 184 Atl. 236 (1936), the court finding that the creditor was not a principal since he merely gave advice as to the operation of the business.

5. McCrory v. Comm. of Int. Rev., 69 Fed. (2) 688 (C. C. A. 5, 1934), where no control was found and hence no agency relation; Bernesen v. Fish, 135 Cal. App. 588, 28 Pac. (2) 67 (1933), where the beneficiaries of a trust were held to be partners because of their control over the business; Earlsboro Gas Co. v. Vern H. Brown Drilling Co., 175 Okl. 320, 52 Pac. (2) 730 (1935), where a partnership was found. It would appear that under the modern decisions with reference to business trusts, the creditors in Cox v. Hickman retained enough control over the trustees so that they might have become responsible. However, recent American cases following the doctrine of that case have not seemed to recognize this. For a discussion of these cases and a statement of the view that the creditors should not be liable, see Douglas, Vicarious Liability and Administration of Risk, 38 Yale L. J. 720 at 735.

The same questions of fact are involved where a person desiring to make a delayed gift delivers a deed or other instrument to a third person to be handed to the donee at the donor's death. If the donor reserved no control, i. e., if the delivery was unconditional, the gift is effective on the donor's death: Citizens' Nat. Bank v. Parsons, 167 Md. 631, 175 Atl. 852 (1934); otherwise if the third person was subject to the donor's control as to the disposition of the property: Scott v. Weimer, 99 Colo. 247, 61 P. (2) 591 (1936).

6. Downs v. Delco-Light Co., 175 La. 242, 143 So. 227 (1932), where a state distributor was held to be a buyer and not an agent.

7. State ex rel. Gas Co. v. Public Service Comm., 337 Mo. 809, 85 S. W. (2) 890 (1935), where, reversing the trial court, it was held that a gas company whose selling price was controlled by a pipe line company was not the agent of the latter.

8. Frederick Inv. Co. v. Am. Surety Co. of N. Y., 314 Pa. 1, 169 Atl. 155 (1933), where it was found that a consignee was not an agent, although the title to goods remained in the consignor.

9. United States v. General Elec. Co., 272 U. S. 476, 47 Sup. Ct. Rep. 192, 71 L. Ed. 362 (1926).

10 Greenlease-Lied Motors v. Sadler, 216 Iowa 362, 249 N. W. 383 (1933); Frick Co. v. Walter Cox Co., 199 N. E. 462 (Ind. App. Ct., 1936).

11. Kneeland v. Emerton, 280 Mass. 371, 183 N. E. 155 (1932).

12. Hall v. Paine, 224 Mass. 62, 112 N. E. 153 (1916).

13. In re F. C. Adams, Inc. v. Thayer, 85 N. H. 177, 155 Atl. 687 (1931), holding that the Statute of Frauds was applicable to a transaction between the two parties. See Douglas and Bates on "Stock Brokers as Agents and Dealers" in 43 Yale L. J. 46.

14. Rosen v. Harde, 238 App. Div. 622, 265 N. Y. S. 154 (1933), where it was held that the customer had made the "customers' man" his own agent by giving him a power of attorney to buy and sell shares through the broker's office. See also Bosak v. Parish, 253 N. Y. 212, 169 N. E. 280 (1929), cited in 15 Corn. L. Q. 646 and 39 Yale L. J. 1174.

15. Nat. Accident & Health Ins. Co. v. Davis, 50 Ga. App. 391, 178 S. E. 330 (1934); Axelroad v. Metropolitan Life Ins. Co., 267 N. Y. 437, 196 N. E. 388 (1935). In both cases it was held that the agent was acting for the insured, a result opposed to the decisions in other comparable insurance cases.

money for premiums received but not forwarded;[16] whether a person to whom a debtor transferred property to hold for creditors was an agent of the debtor or a trustee for the creditors;[17] whether an intermediary receiving payment of a debt was the agent of the creditor or of the debtor;[18] and whether a person to whom a borrower has paid a commission for obtaining a loan was his agent or the agent of the lender.[19]

Another situation of increasing importance is that involving the liability of a corporation for the acts of a wholly controlled subsidiary. The matter is too intricate to be more than suggested here; it has a rapidly growing literature of its own.[20] It is worth while only to point out that among other grounds for imposing liability upon a dominant corporation is that of control and direct interference, aside from stock ownership, with the affairs of the subsidiary. Where this control exists, it is fairly clear that in accordance with the normal principles of agency, liability to the parent corporation results from the acts of the subsidiary.[21]

The position of the escrow-holder has not been clearly defined although ordinarily it is stated that he is an agent for both parties,[22] and hence a fiduciary. Because of this, consistently with general agency principles, he is under a duty not to act adversely to either of his principals[23] and not to deal with either of them without disclosing his interest.[24] His knowledge can be imputed to one of the parties,[25] and he holds as trustee any money received as long as a definite res is in existence.[26] It may be suggested that the same result could be reached by holding that the escrow-holder is a fiduciary although not an agent for either of the parties. Differing from an agent, the escrow-holder, while under a duty of obedience to both, is under no duty of obedience to either one, his duty being to follow the directions contained in the agreement by which his position was established. With respect to either of the parties he is more nearly in the position of one who has a power coupled with an interest which is held for the other party.

A similar problem is suggested in the case of an interpreter who is usually held to be an agent of the person whose words he is interpreting,[27] although when faced with the effect of a statute which would have prevented the admission of his testimony, it was found that he was not the kind of an agent whose testimony it was the statutory purpose to exclude.[28] It may be suggested that as between the two parties to the transaction, the interpreter should be considered a fiduciary for both unless he has been primarily employed by one of them, so that if he makes an error in interpretation as a result of which the contract as made differs from what either of them understood, there should be rescission at the request of the one whose words he misinterpreted as well as at the request of the other party. The same reasoning should apply to telegraphic communications incorrectly transmitted by the telegraph company, in situations where the recipient has authorized the use of the telegraph and there is no understanding as to the risk of error.

INFANT PRINCIPAL

In a number of recent cases, the infancy of the principal has played a leading part both with reference to his own liability and with reference to the liability of his agent. The Restatement does not deal generally with capacity and hence has no statements as to the liabilities inter se of principal and agent where one of them is incompetent; nor does it state rules as to the liability of partially incompetent persons for unauthorized acts of their agents or servants. In §20, however, it states with reference to the creation of authority that "a person who has capacity to affect his legal relations by giving consent has capacity to authorize an agent to act for him with the same effect as if he were to act in person." Many of the older cases held that an infant had no capacity to appoint an agent; the Restatement followed the tendency of modern cases to hold that he has such capacity subject to the power of disaffirmance in contract cases.[29] The

16. In Bloodgood v. Woman's Ben. Assn., 36 N. M. 228, 13 Pac. (2) 412 (1932), it was held that the secretary of a local lodge was its agent although the members were required to make payments to him for the use of the grand lodge. Compare with this Knights of Pythias v. Withers, 177 U. S. 260, 44 L. Ed. 762, 20 Sup. Ct. R. 611 (1900), where it was held that the requirement that the members of the local lodge should pay the secretary necessarily made the latter the agent of the grand lodge for the purpose of receiving premiums although the local lodge had full control over the secretary. I suspect that the real basis of the decision was the element of unfairness in the transaction and that, following precedents set in other insurance cases, the court believed the contract of the parties to be contrary to public policy.

17. Lucey v. Vilhauer, 264 N. W. 203 (S. D., 1935), where it was held that the transferee was an agent and, being a fiduciary, could not properly acquire and later enforce the claims of creditors against the debtor.

18. In Morley v. Univ. of Detroit, 269 Mich. 216, 256 N. W. 861 (1934), the mortgagor paid the trustee for bondholders, in advance of the date for payment on the bonds but in accordance with the agreement. The trustee became insolvent and it was held that the bondholders suffered the loss. It is to be noted that, as in the case of an escrow-holder, the trustee is an agent for the entire group although not subject to the control of any one of the group.

19. Pushee v. Johnson, 123 Fla. 305, 166 So. 847 (1936); Clemson v. Best, 174 Wash. 601, 25 Pac. (2) 1032 (1933).

20. See Douglas and Shanks, Insulation from Liability through Subsidiary Corporations, 39 Yale L. J. 193; Powell, Parent and Subsidiary Corporations; Latty, Subsidiaries and Affiliated Corporations; note in 24 Calif. L. R. 447.

21. Rapid Transit Subway Constr. Co. v. City of N. Y., 259 N. Y. 472, 182 N. E. 145 (1932); Mangan v. Terminal Transportation Co., 157 Misc. 627, 284 N. Y. S. 183 (1935); Mirabito v. San Francisco Dairy Co., 9 Cal. App. (2) 54, 47 Pac. (2) 530 (1935).

22. Blackburn v. McCoy, 1 Cal. App. (2) 648, 37 Pac. (2) 153 (1934).

23. McFate v. Bank of America of California, 125 Cal. App. 683, 14 Pac. (2) 146 (1932).

24. French v. Orange County Investment Corp., 125 Cal. App. 587, 13 Pac. (2) 1046 (1932), where the escrow-holder, without revealing the facts, took for himself the property which the person who had contracted to buy it refused to take.

25. Ryder v. Young, 9 Cal. App. (2) 545, 50 Pac. (2) 495 (1935).

26. Squire, Supt. of Banks v. Branciforti, 131 Ohio St. 344, 2 N. E. (2) 878 (1936), where a preference was given against the general creditors of the bank which had received money "in escrow," although apparently the bank was merely a debtor, a confusion frequently made where money is received for a special purpose but where there is no segregation of funds and no tracing of funds possible.

27. See Bonelli v. Burton, 61 Ore. 429, 123 Pac. 37 (1912).

28. Reichert v. Negaunee State Bank, 266 Mich. 413, 254 N. W. 149 (1934).

29. Crawford v. Firmin, 143 Kans. 794, 59 P. (2) 27 (1936); Casey v. Kastel, 237 N. Y. 305, 142 N. E. 671 (1924). In King v. Cordrey, 36 Del. 418, 177 Atl. 303 (1935), it was held that a power of attorney to confess judgment under which a judgment was entered against the infant two years after he had attained his majority was valid upon his failure to disaffirm. This case is noted in 83 Pa. L. Rev. 1031, as the first

older approach has been used to deny liability against an infant principal because of the negligence of his servant.[30] It is suggested that the denial of liability is highly inequitable where the infant has benefited from the whole course of conduct of the servant or where, as may happen in automobile cases, the infant has liability insurance which would not protect the driver and through him the injured person, unless the driver were regarded as a servant. Even in the absence of such circumstances, the result of the single case imposing liability[31] would seem to be preferable. Whether or not the infant should be liable (and most modern writers agree that he should be[32]) the result should not be based upon his capacity to appoint a servant but should depend upon the desirability of relieving from liability an infant employer where the harm has been caused by the servant and is not the direct consequence of the infant's act.

A person who acts as an agent of an infant takes great risks. In a recent case,[33] an infant directed a stockbroker to purchase shares at a time when the market price was high. The broker did so, turning over the stock to the infant and paying the sellers. Later, the market value of the shares fell. The infant tendered back the certificates to the broker and demanded the amount paid for the shares. It was held that the infant was entitled to this on the theory that infants are privileged to disaffirm the agency relation. Assuming that the appointment of an agent is voidable, it is clear that upon avoidance an infant is entitled to restitution of his property from a third person to whom it was transferred by the infant's agent in accordance with a contract, this being consistent with the rule that an infant can avoid his contracts. It is also clear that if the broker, although in name an agent, in fact sells shares to the infant, restitution by him is required by the cases. If, however, the broker is merely an agent receiving money from the infant to pass on to the third person, such a result is neither just nor technically defensible. Thus it has been held that if a person owes money to an infant and at the infant's request pays the money to a third person as the satisfaction of an infant's debt, the debt is satisfied.[34] Likewise, if a bailee were to deliver the infant's property to a third person to whom the infant had sold it, it would seem clear that the bailee would not be liable to the infant upon the latter's subsequent disaffirmance. I would assume that if a broker were employed to advise the infant what shares to purchase and thereupon the infant were to purchase the shares directly from a third person, the broker would not be liable to the infant for the purchase price upon the infant's rescission, although the infant could recover the commission or compensation paid the broker. These cases do not seem substantially different from the case where the infant gives money to a broker to pay the seller, the broker acting as a conduit pipe, his commission being subtracted from the total. Whether or not a trust created by an infant can be rescinded so as to make the trustee responsible to the infant for the value of the property turned over to the trustee irrespective of a subsequent decline in its value, the agency situation in which the infant directs the agent to act is different, since the infant directs the particular operation. It is true that under the stock exchange system, the seller is unknown and the infant's money may be and usually is paid before the receipt of the stock. But this does not rebut the idea that the stockbroker is merely a means by which the infant acts. He is not an adversary party and the reasons which lie back of the infant's right of rescission as against a buyer or seller do not apply. On the same ground, a bank which pays checks signed by the infant would be under a duty of reimbursement for the total amount of deposits, at least, if the checks were not drawn for necessaries. The common law rule permitting any person under twenty-one years of age to rescind his contracts although the other party does not know of the nonage and even, in some states, if the infant has misrepresented his age, needs modification. There are in fact some inroads upon the ancient rule, as is indicated by the cases which deny to an infant partner the right to withdraw property from the partnership when this is needed to pay firm creditors.[35] Certainly the privilege of rescission should not be extended. It may be that a third person who assists an infant in dissipating his substance should be liable to him upon a tort ground, analogous to liability for fraud or duress, but this ground has not yet been suggested where there has been no transfer to or by the person to be charged and only on this ground should an agent be required to make restitution to his infant principal of property or money of the infant transferred to a third person.

The position of an agent of an infant who has disaffirmed is made further difficult because of his possible liability to a third person with whom he contracts for the principal. The question has seldom been brought before the courts, but it arose recently.[36] In the absence of evidence that the

case holding that an infant's power of attorney to confess judgment is not void. As to an infant's capacity to appear by attorney or a general guardian, see Laute v. Gearhart, 11 N. J. M. 117, 165 Atl. 115 (1933).

30. Hodge v. Feiner, 90 S. W. (2) 90, 103 A. L. R. 483 (Mo. Sup. Ct., 1935); Fernandez v. Lewis, 92 S. W (2) 305 (Tex. Civ. App., 1936).

31. Scott v. Schisler, 107 N. J. L. 397, 153 Atl. 395 (1931).

32. See Infant's Responsibility for his Agent's Tort by Charles O. Gregory in 5 Wis. L. Rev. 453, in which the subject is exhaustively treated. See also notes in 44 Harv. L. Rev. 1292 and 21 Corn. L. Q. 623.

33. Schroeder v. Hitt, 236 App. Div. 466, 260 N. Y. S. 2 (1932), following Casey v. Kastel, 237 N. Y. 305, 142 N. E. 671 (1924), where the court held the broker employed by an infant to sell became liable for conversion of the share certificate upon failure to give restitution to the infant when the latter disaffirmed. In Joseph v. Schatzkin, 259 N. Y. 241, 181 N. E. 464 (1932), it was held that the broker who had sold the infant's shares was liable only for their value at the time of disaffirmance. The court said, however: "If a fixed sum of money had been deposited, then at the date of disaffirmance, plaintiff (the infant) would probably have been entitled to recover that amount." In Benson v. Tucker, 212 Mass. 60, 98 N. E. 589 (1912), an infant who had bought and sold shares in a series of transactions through a stockbroker was allowed to recover from the broker the amount of his losses. Note that in Massachusetts, a broker is not, for most purposes, an agent.

34. Welch v. Welch, 103 Mass. 562 (1870).

35. Bush v. Linthicum, 59 Md. 344 (1882); Pelletier v. Couture, 148 Mass. 269, 19 N. E. 400 (1889); Yates v. Lyon, 61 N. Y. 344 (1874), semble. Also see Johnson v. Northwestern Mutual Life Ins. Co., 56 Minn. 365, 59 N. W. 992, 26 L. R. A. 181, 45 Am. St. Rep. 473 (1894), where an infant who sought to rescind a life insurance policy was permitted to receive only its cash surrender value.

36. Goldfinger v. Doherty, 276 N. Y. 289, 153 Misc. 826, aff. 244 App. Div. 779, 280 N. Y. S. 778 (1935). The only previous case known to me is Patterson v. Lippincott, 47 N. J. L. 457, 1 Atl. 506, 54 Am. Rep. 178 (1885). The court there found that the agent was not liable when there had been no

agent knew of the infancy of the principal, the court found the agent not liable to the third person, following the Restatement rule, §332, by which the agent is not subject to liability because of the failure of the infant principal to perform, "unless he contracts or represents that the principal has capacity or unless he has reason to know of the principal's lack of capacity or of the other party's ignorance thereof." The dissenting judge apparently thought that the effect of this rule would be to permit an agent who knew the facts to escape liability if the principal should affirm the agency but should disaffirm the contract, a result which I agree would be highly inequitable but which I do not think follows from the language of the Section.

PROPERTY ACQUIRED THROUGH A FRAUDULENT OR UNAUTHORIZED AGENT

The decision of a case is usually the resultant of a number of principles either converging or conflicting. Sometimes the fundamental bases of decisions have been so obscured by the use of legal fictions or by the repetition of phrases, that the relation between situations which are fundamentally similar is not readily seen. This has occurred in the large group of cases where an agent, by fraud or by promises not authorized by the principal and which do not bind him, has acquired property which comes to the principal, either directly or through a prior conveyance to the agent and by him to the principal. One of three results may follow: The principal may be permitted to retain the property without being responsible for the agent's fraud or promises; he may be required to surrender the property or its value; or his retention of the property may cause him to be liable to the third person for the fraud of the agent or upon the agent's unperformed promises. The answer in these cases does not involve primarily the liability of a principal for the acts of an agent since, by hypothesis, the principal was not bound by the agent's act in acquiring the property; the decision depends upon what it is equitable to require the principal to do after he has discovered the facts. If he is required to return the property, it is because otherwise he would be unjustly enriched; if he is made liable for the fraud of the agent or is required to perform the agent's promises, it is because, since he has refused to make the required restitution, it is equitable now to require him to assume responsibility.

These situations, however, appear in legal writings in widely separated places. Thus, in the Restatement which follows the conventional form, Sections 98 and 99 state that a principal who acquires with knowledge or retains after acquiring knowledge, of the facts, the proceeds of an unauthorized contract purported to be made for him, is liable to the other contracting party on the ground of ratification, provided he has not changed his position and has no right to the proceeds independently of the act by which they were acquired. Section 141 (b) recognizes that the principal may be liable on the ground of unjust enrichment. Sections 259 and 260 state that a third person defrauded by one purporting to act for another is entitled to rescission and consequent restitution from the principal on whose account the agent purported to act, provided the principal did not change his position before the facts were discovered, even though the agent did not subject the principal to tort liability by his fraud or promises. Sections 274 and 282 involve substantially the same situations with the addition of those where the agent has obtained property from a third person without purporting to act as agent. These later Sections use the recognized method of imputing the knowledge of the agent to the principal, stating in substance that a principal for whom an agent has acquired property is, as to the interest in such property, in the same position as if the principal had acquired it with the knowledge of the agent, again provided that the principal did not change his position before acquiring knowledge of the facts known to the agent.

Dealing first with the cases where an agent contracts with a third person making fraudulent misrepresentations or unauthorized promises, we find some disagreement. Intricate problems are raised in the attempt to deal justly with each of two persons, both innocent, of whom one must lose money or at least be deprived of an expected profit upon which he may have relied. There is no generalization which will adequately take account of the shades of difference between situations where, on the one hand, an honest and careful principal is dealing through an agent with an experienced and careful business man, and situations where a dubious scheme is being pushed through by high pressure salesmen dealing with ignorant and credulous buyers. As might be expected under a system which largely operates under rules making it difficult adequately to take account of the varying factors entering into individual transactions, the courts are not wholly agreed as to results. Some tend to assume that the third person is always competent and needs no help; others give him a large measure of protection.

In the absence of a clause in the agreement that the principal is not to be bound by extrinsic statements of the agent, the courts are generally agreed that an unauthorized representation of a material fact by the agent entitles the third person to rescind if the principal has not changed his position before discovery of the facts. This subjects the principal to liability for the benefit received,[37] normally with-

disaffirmance by the infant principal. The Restatement rule was cited with approval in U. S. Gypsum Co. v. Carney, 200 N. E. 283 (Mass., 1936), which, however, although correct in result might have been rested upon a different ground.

37. Mergenthaler Linotype Co. v. Evans, 69 Fed. (2) 287 (C. C. A. 9, 1934); State Bldg. & Loan Assn. v. Bradwell, 227 Ala. 606, 151 So. 689 (1933); Hartman v. City Nat. Bank of San Francisco, 219 Cal. 510, 27 Pac. (2) 764 (1933); Page v. Keeves, 362 Ill. 64, 199 N. E. 131 (1935); Farmer v. O'Carroll, 162 Md. 431, 160 Atl. 12 (1932), ("unless the misrepresentations are so unreasonable that a reasonably prudent man would not rely upon them"); McDermott v. Ralich, 188 Minn. 501, 247 N. W. 683 (1933); Mississippi Power Co. v. Bennett, 173 Miss. 109, 161 So. 301 (1935); Iback v. Elevator Supplies Co., 118 N. J. Eq. 90, 177 Atl. 458 (1935), semble; Kaufman v. Jaffee, 244 App. Div. 344, 279 N. Y. S. 392 (1935), in which the agent was successfully joined as a party defendant; Kramer v. K. O. Lee & Son Co., 64 N. D. 84, 250 N. W. 373 (1933), where the fraud was as to the contents of the written memorandum of the contract; Berry v. Stevens, 168 Okl. 124, 31 Pac. (2) 950 (1934), fraudulent concealment, the court relying upon the Restatement Sections; Delaware Punch Co. of America v. Reinarz, 61 S. W. (2) 135 (Tex. Civ. App., 1933); Donigan v. Polacek, 85 S. W. (2) 771 (Tex. Civ. App., 1935), a misrepresentation by a real estate broker as to the area of land sold where he had no authority to represent either the quality or extent of the land.

It is to be noted that misrepresentations by persons who are not and who do not purport to be agents, do not affect the

out reference to the kind of statement made, and may cause him, if he refuses to return the proceeds, to be liable in deceit on the theory of ratification.[38] The same liability results where, in place of misrepresentation, there has been duress or other tortious conduct by the agent.[39]

Where there has been no misstatement of an existing fact, but where an unauthorized promise (such as a promise to buy back the subject matter) is made by the agent the courts are not in agreement. In the absence of a change of position by the principal, it would seem equitable to put the parties back into their original position and this has uniformly been held where the whole transaction was entirely unauthorized.[40] Where, however, the principal authorized a contract and the transaction as consummated by the agent fails to bind the principal because of additional unauthorized promises of which the principal had no knowledge when the agent returned the proceeds, some courts have held that the principal is entitled to hold the proceeds without being bound by the unauthorized promises if the transfer has been completed.[41] In a case in which a corporation was the principal it was held that if the promises by the agent would be ultra vires if made by the directors, the transaction stands, minus the unauthorized terms.[42] The present tendency, however, is to permit rescission even though the third person should have realized that the agent had no authority to make such promises.[43] This seems equitable only to the extent that there has been no change of position on the part of the principal since by hypothesis, until he learns the facts, the principal is not responsible. In many cases, mere lapse of time would make it inequitable to require the principal to rescind except on condition that any damage which he has suffered should be made up by the third person. This possibly explains cases in which the results otherwise would seem unjust.[44] Although the cases in which the defense of change of position has been specifically mentioned are far from numerous,[45] a recent case has adopted the suggestion made by the Restatement, going a bit beyond it in requiring the third person before obtaining rescission to prove affirmatively that the principal has suffered no change of position.[46]

Where there is a term in the memorandum which provides that the principal is not to be bound by statements of the agent not contained therein there is a wider divergence in the cases. Probably a majority of the states are in accord with the Restatement Section which would permit rescission,[47] although not necessarily an action of deceit.[48] At least one court has recently changed its position to accord with the Restatement rule.[49] Where, however, there has been no fraud by the agent except in misrepresenting that he had power to bind the principal by his promises, many courts have denied restitution.[50] It would appear that the same reasoning by which the principal is prevented from benefiting from his agent's fraud should deny the principal a right to retain proceeds of his agent's un-

liability of one who has received property as a result of them: Newcomb v. Title Guarantee & Trust Co., 131 Cal. App. 329, 21 Pac. (2) 456 (1933); Przybylski v. Von Berg, 211 Wis. 178, 248 N. W. 101 (1933). Compare the rule in some jurisdictions that the principal is bound by unauthorized statements only of agents who complete the transaction (see note 47).

38. Lewis v. McClure, 127 Cal. App. 439, 16 Pac. (2) 166 (1932); Mid-West Chevrolet Corp. v. Noah, 173 Okla. 198, 48 Pac. (2) 283 (1935).

39. Daum v. Urquhart, 61 S. D. 431, 249 N. W. 738 (1933), duress; Hardt v. Phillips Pipe Line Co., 85 S. W. (2) 202 (Mo. App., 1935), where the agent had a deed from the complainant acknowledged without the complainant's presence, the statutory effect being the same as the spoilation of the deed.

40. Campbell Coal Co. v. Manchester Baptist Church, 46 Ga. App. 729, 169 S. E. 59 (1933); Arnold v. Genzberger, 96 Mont. 358, 31 Pac. (2) 296 (1934), where the retention of sinks put into defendant's building was held to make him liable for the value of the tubs and the labor of installation.

41. Murray v. Standard Pecan Co., 309 Ill. 226, 14 N. E. 834 (1923), where there was an unauthorized promise to buy back shares sold to the plaintiff, the court limiting the rule to what it described as completed as distinguished from executory contracts.

42. Kennedy v. Central Power Co., 129 Neb. 637, 262 N. W. 504 (1935), alleged oral promise to repurchase shares which was not, however, proved.

43. Enid Bank & Trust Co. v. Yandell, 176 Okla. 550, 56 Pac. (2) 835 (1936), agreement to repurchase; Southern Surety Co. v. Texas Concrete Pipe Co., 62 S. W. (2) 534 (Tex. Civ. App., 1933), agreement to make payments to a third person; Reed v. Piatt Development Co., 112 W. Va. 314, 164 S. E. 849 (1932), agreement to refund payments.

44. In Murray v. Standard Pecan Co., note 41, and in Enid Bank & Trust Co. v. Yandell, note 43, there was a period of several years before relief was sought and during which time the situation may have substantially changed.

45. Chismore v. Marion Sav. Bank, 221 Iowa 1256, 268 N. W. 137 (1936), where the principal had transferred the subject matter.

46. Johnson v. City Co. of New York, Inc., 78 Fed. (2) 782 (C. C. A. 10, 1935).

47. Abercrombie v. Martin & Hoyt Co., 227 Ala. 510, 150 So. 497 (1933); Klee v. Chicago Trust Co., 1 N. E. (2) 548 (Ill. App. Ct., 1936); National Equipment Corp. v. Volden, 190 Minn. 596, 252 N. W. 444 (1934), noted adversely but, as I think, unsoundly, in 32 Mich. L. Rev. 1003; Tams v. Abrams, Ramos & Co., 185 Atl. 521 (N. J. L., 1936); Angerosa and Delorio v. The White Co., 248 App. Div. 425, 290 N. Y. S. 204 (1936), noted adversely in 22 Corn L. Q. 102, but with the recognition that it represents the majority viewpoint; Shary v. Helmick, 90 S. W. (2) 302 (Tex. Civ. App., 1935), adopting the Restatement viewpoint, but limiting the rule to cases in which the misrepresenting agent is more than a soliciting agent; Przybylski v. Von Berg, 211 Wis. 178, 248 N. W. 101 (1933), semble. Contra: Barnebey v. Barron G. Collier, Inc., 65 Fed. (2) 864, (C. C. A. 8, 1933), where the agent was merely a soliciting agent. In Ernst Iron Works v. Duralith Corp., 270 N. Y. 165, 200 N. E. 683 (1936), the court, citing Sections of the Restatement other than § 260, denied restitution on the ground, among others, that the officers of the plaintiff were business men and knew better than to rely upon an oral representation. This is consistent with a suggestion in an earlier deceit case (Deyo v. Hudson, 225 N. Y. 602, 122 N. E. 635 (1919) that the principal should not be liable for unauthorized deceit if the other party was negligent. That view appears to be sound when applied to actions for deceit where the principal has had no opportunity to rescind.

48. Schroeder v. Dickinson & Gillespie Corp., 6 Cal. App. (2) 175, 44 Pac. (2) 425 (1935); Harnischfeger Sales Corp. v. Coats, 4 Cal. (2) 319, 48 Pac. (2) 663 (1935). Contra, i. e., an action of deceit can be maintained; People's Auto Co. v. Staples, 225 Ala. 372, 143 So. 553 (1932), in which the agent represented an old car as a new one and the buyer was allowed the difference between the value of the old car and that of a new one; Pedalty v. G. F. Nixon & Co., 6 N. E. (2) 290 (Ill. App., 1937), where the agency point was not discussed.

49. The older California cases generally held that rescission should not be granted: Tynan Lumber Co. v. W. A. Hammond Co., 124 Cal. App. 159, 12 Pac. (2) 45 (1932); Lozier v. Janss Inv. Co., 1 Cal. (2) 666, 29 Pac. (2) 470 (1934), semble; Clancy v. Becker-Arbuckle-Wright Corp., 137 Cal. App. 43, 29 Pac. (2) 868 (1934). These cases were in effect overruled in Speck v. Wylie, 1 Cal. (2) 625, 36 Pac. (2) 618 (1934), which relied upon the Restatement.

50. Babbitt Bros. Trading Co. v. New Home Sewing Machine Co., 62 Fed. (2) 530 (C. C. A. 9, 1932); Trujillo v. Wichita Farm Lighting Co., 91 Colo. 307, 14 Pac. (2) 1009 (1932); Hoffman v. Wichita Farm Lighting Co., 94 Colo. 153, 28 Pac. (2) 808 (1934); Cavanaugh v. Van Dam, 264 Mich. 383, 249 N. W. 880 (1933); King v. Comm. Finance Co., 163 Va. 260, 175 S. E. 733 (1934), rested partly on the parol evidence rule.

authorized promises, especially since in most of the cases the agent knows that they will not be performed by the principal.[51] In such cases liability is sometimes imposed through the technique of estoppel.[52] Where the principal is entitled to retain the subject matter independently of the promise or fraud of the agent, he is, of course, not affected by the retention,[53] except where, in any event, he would be liable for the agent's deceit or tort.

In cases where the courts use the language of "imputed" knowledge, that is, where the principal is subjected to liability because he is charged with the knowledge of an agent, there are, in general, three bases of liability. First, the principal may be made liable because of the conduct of a servant in the scope of employment or of an agent who has been negligent in carrying out orders. This situation is represented by cases where a master is made liable because a servant knew of the vicious propensity of an animal or where a principal is bound by the equity of a third person in property acquired by him because an agent under a duty of informing the principal did not do so. Such cases have no relation to ratification or to unjust enrichment.[54] Secondly, the principal may be subjected to liability because he has received property through the act of an agent and is bound on the doctrine of ratification or because of unjust enrichment, as where an agent purporting to act on his account obtains property by fraud and subsequently the principal with knowledge of the facts retains it.[55] In such cases the problem is identical with that discussed in the preceding paragraphs, and the results are the same, whether or not the courts use the language of imputed knowledge. The third type of case is where an agent, not purporting to act for the principal, acquires property which he subsequently transfers to the principal or where, although purporting to acquire it for the principal, he subsequently transfers it to the principal as coming from himself. Here there is essentially no agency problem involved. Thus, where an agent (or anyone for that matter) has stolen money from the principal and surreptitiously replaces it with other money tortiously obtained from a third person, the principal is prima facie liable on the ground of unjust enrichment.[56] If the agent pays the money to the principal to satisfy a pre-existing debt, the principal should have the defense of bona fide purchase,[57] unless there are suspicious circumstances of which the principal has notice.[58] Likewise if, because of the replacement, the agent is enabled to continue to embezzle, the principal may have the defense of change of position,[59] as he should if the agent, having made a temporary deposit, again withdraws the amount.[60] Where the agent uses the money to make up for a defalcation and then makes a settlement with the principal who is unaware that a defalcation ever took place, there is doubt as to whether the settlement amounts to the satisfaction of a pre-existing debt so as to constitute the principal a bona fide purchaser.[61]

Where there is an ostensible transaction with the principal, in which, however, the agent is on both the giving and the receiving end, we have the difficult "single actor" case. The difficulties are apparent in a recent well-reasoned case[62] using the language of imputed knowledge, a case which illustrates the narrow line which may separate the granting and the denial of restitution. A bank president who was in complete control of the bank, in receivership at the time of the trial, obtained securities from the plaintiff by fraud, pledging them with the bank as collateral security for a loan to him, this being done through a complacent and wholly subservient loan committee. The plantiff was granted a return of the securities.

As pointed out by the court, had the president not been in complete control for the bank, the latter would have been a bona fide mortgagee since it would have acquired title through the consent of the loan committee and since in the transaction the resident would have acted, not as an agent, but as an adversary party.[63] On the assumption, however, that the president was in such complete control of the bank that the situation was as if he alone had acted in making the deposit and in borrowing the money, the bank could not claim the benefit of his act without becoming liable because of the knowledge which he had. Using the language of restitution, if we assume that the other bank officials would have permitted the president to withdraw funds at any time and that the plaintiff's shares were used only as window dressing, the bank has received the shares without giving or losing anything in return.

I suggest, however, that such a result may be unfair to the depositors of the bank if an additional factor is present. If the transaction enabled the president to borrow when otherwise he would have been unable to do so (because of the fear of the bank examiner or otherwise) it would appear to be unjust to give a preference to the one whose

51. Bassett v. Pallotti, Andretta & Co., 117 Conn. 58, 166 Atl. 752 (1933); Floor v. Mitchell, 86 Utah 203, 41 Pac. (2) 281 (1935).

52. Farm Mortgage Inv. Co. v. Cassell, 168 Okla. 312, 33 Pac. (2) 737 (1934); Union Bank & Trust Co. v. Dowman, 109 W. Va. 493, 155 S. E. 465 (1930).

53. Ernshaw v. Roberge, 86 N. H. 451, 170 Atl. 7 (1934); W. W. Dillon & Co. v. Sharber, 90 S. W. (2) 533 (Tenn. Ct. of App., 1935); Singer Sewing Machine Co. v. Mendoza, 62 S. W. (2) 656 (Tex. Civ. App., 1933).

54. Myers v. Burke, 120 Conn. 60, 179 Atl. 88 (1935); Harris Cty. Houston Ship C. Nav. Dist. v. Williams, 87 S. W. (2) 813 (Tex. Civ. App., 1935). It is in this type of case that the adverse interest of the agent prevents the imputation of knowledge (liability) of the principal. See Ryan v. Scovill, 140 Kan. 588, 38 Pac. (2) 1007 (1934).

55. Where the receiving teller of a bank receives a deposit knowing the bank to be insolvent, knowledge is imputed and a preference given. Abandoning the language of "imputed knowledge," we can reach the result by stating that the fraudulent concealment creates a constructive trust: Ronchetto v. State Bank of Bevier, 227 Mo. App. 83, 51 S. W. (2) 174 (1932).

56. Peoples State Bank of Jordan v. Ruppert, 189 Minn. 348, 249 N. W. 325 (1933); Lincoln Nat. Bank & Trust Co. v. School Dist., 124 Neb. 538, 247 N. W. 433 (1933), but quaere whether, in this case, the bank which was made liable was more than a conduit pipe for embezzled funds.

57. Aetna Casualty & Surety Co. v. Local Bldg. & Loan Assn., 163 Okla. 141, 19 Pac. (2) 612, 86 A. L. R. 536 (1933). But see Gonzales v. Inter. Guar. Co., 218 Cal. 612, 24 Pac. (2) 462 (1933).

58. Camden Securities Co. v. Azoff, 112 N. J. Eq. 270, 164 Atl. 398 (1933).

59. Aetna Casualty & Surety Co. v. Local Bldg. & Loan Assn., note 57, supra.

60. Matteawan Mfg. Co. v. Chemical Bk. & Tr. Co., 244 App. Div. 404, 279 N. Y. S. 495 (1935). But see Central Surety & Ins. Co. v. Medomak Nat. Bk., 5 Fed. Supp. 252 (1933).

61. See Matteawan Mfg. Co. v. Chemical Bk. & Tr Co., note 60, supra.

62. Munroe v. Harriman, 85 Fed. (2) 493 (C. C. A. 2, 1936). A similar case with the same result is Bosworth v. Md. Casualty Co., 74 Fed. (2) 519 (C. C. A. 7, 1935).

63. Restatement, § 279.

trust in the president was the most important cause of the loss. There is here no unjust enrichment as the result of the entire transaction. Nor can liability be predicated upon the fraud of an agent, qua agent, since the borrowing was done as an individual so that it differs from the case where one, while dealing with a third person as agent, by fraud obtains property for his principal, in which case the defrauded person is given a preference if the money or securities can be traced. The stockholders, however, who permitted the continuance of a situation in which one person was in complete control should not be able to object to the granting of a preference.

Socrates Questions Stranger as to Political Situation in His Country—An Alleged Ancient Latin Manuscript Appears to Deal with Supreme Court Issue

CONSIDERING the interest which the Supreme Court issue has aroused in all quarters, it is not surprising to find that it has received the attention of the Chicago Classical Club, an organization whose name sufficiently describes it. An announcement of its closing meeting on May 8 has come to hand, and it contains certain matter bearing upon this important question.

"As classical people do not live exclusively in the past, but are keenly alive also to the problems of the present", says the announcement, "the Club may be permitted to print herewith two remarkable compositions with a bearing on today's controversies (as to the merits of which the Club of course expresses no opinion.) The second is obviously from the hand of Cicero. . . Over against this we may set a short fragment said to be copied from a recently discovered papyrus . . . in which Socrates questions a native of the lost continent of Atlantis, beyond the pillars of Hercules, regarding the political situation there. . ."

Following are these two contributions to the rapidly growing literature on the subject. A translation of the Socratic dialogue is appended for the benefit of readers who may have mislaid their Greek:

Σ ω κ ρ ά τ η ς· πόθεν δὴ ἥκεις, ὦ ξένε, εἰς τήνδε τὴν γῆν;

Ξ έ ν ο ς· ἴσως ἤδη ἤκουσας νῆσόν τινα Ἀτλάντιδα καλουμένην κεῖσθαι ἔξω τῶν Ἡρακλειῶν στηλῶν.

Σ ω κ ρ ά τ η ς· πάνυ μὲν οὖν.

Ξ έ ν ο ς· ἐντεῦθεν ἀφῖγμαι, ὦ Σώκρατες, δεδιὼς στάσιν καὶ πόλεμον ἐπιδήμιον κρυόεντα.

Σ ω κ ρ ά τ η ς· τὶ οὖν μαθόντες στασιάζουσι οἱ νησιῶται; δημοκρατοῦνται ἢ ἀριστοκρατοῦνται;

Ξ έ ν ο ς· ἡ πολιτεία λόγῳ μὲν δημοκρατία, ἔργῳ δὲ ὑπ' ἐννέα γερόντων ἀρχή. αὕτη μὲν οὖν ἡ γερουσία καλεῖται δικαστήριον κράτιστον καὶ ἀξιοῖ δοκιμάζειν πάντας τοὺς νόμους οὓς ἑκάστοτε τιθέασιν ἡ βουλὴ καὶ ἡ ἐκκλησία. καὶ δὴ πολλοὺς ἀποδοκιμάζει.

Σ ω κ ρ ά τ η ς· ἆρα οὐ διὰ ταῦτα ἀγαναχτεῖ ὁ δῆμος;

Ξ έ ν ο ς· μάλιστα, ἀλλὰ πολλοὶ δεδοίκασι μὴ ὁ προστάτης τοῦ δήμου ἐκβάλῃ τοὺς πρεσβυτέρους ἐκ τοῦ δικαστηρίου καὶ πείθῃ τὴν βουλὴν αἱρεῖσθαι ἄλλους οἳ ποιήσουσιν ὅ τι ἂν βούληται ὁ προστάτης.

Σ ω κ ρ ά τ η ς· ἆρα οὖν οὗτος ὁ προστάτης γενήσεται τύραννος;

Ξ έ ν ο ς· οἱ μὲν ταῦτα λέγουσιν, οἱ δὲ ἄλλως.

TRANSLATION

SOCRATES: Whence have you come, stranger, to this land?

STRANGER: Well, perhaps you have heard that a certain island called Atlantis lies beyond the Pillars of Hercules?

SOCRATES: Yes, indeed.

STRANGER: I have come thence, Socrates, fearing a revolution and a bloody civil war.

SOCRATES: What have the islanders heard, that makes them think of a revolution? Are they under a democratic or an aristocratic form of government?

STRANGER: The constitution is a democracy in theory, but in fact there is a government by nine old men. Now, this group of old men is called the Supreme Court and it has the power to disallow all the laws which the Senate and the Assembly pass from time to time; and indeed it does disallow many.

SOCRATES: Are not the people disturbed at these things?

STRANGER: Very much so, but many fear lest the president of the people cast out the older men from the Court and persuade the legislature to choose others who will do whatever the president wishes.

SOCRATES: Why, will not this president become a dictator?

STRANGER: Some say so, others the opposite.

DE CURIA SUMMA AMERICANA

De Curia Summa Americana tempore praesenti multum agitur. Alius aliud magno clamore blaterat. Multi affirmant Praesidem velle, eligentem et addentem Curiae sex natu minores iudices, obsequiosos fidosque sibi, perficere ut sua consilia, suae sententiae praevaleant; hoc ducturum ad maiestatem dictatoriam.

Alii autem clamorem aeque clarum tollunt illos Novem Senes, qui nunc Sella Suprema sedeant, iam mentes sanas in sanis corporibus habere, iam satis doctos et iure peritos esse; nefas cogere eos recedere.

Pro deum fidem, quid credamus?

Plerique ex nobis, audeo dicere, fortasse sentiunt Praesidem extra modum et extra hos cancellos esse egressum, quos Constitutio Americana statuerit; oportere ut Praesidi sit cura sola legum *administrandarum*—nunquam *scribendarum*.

Verum immortale scripsit olim poeta:

"Tempora mutantur, nos et mutamur in illis."

Esto. At tamen, per omnes deos qui pedibus Olympum magnum pulsant, si forte Constitutio nostra mutanda est, sit mutanda maximopere Populo Americano modo praescripto, haudquaquam minimopere Praeside, qui nihil aliud est nisi *Legatus, Servus, Dux* populi—minime *Rex, Imperator, Dictator*.

Erramus, puto, si credimus Curiam Summam leges aut scribere aut rescindere aut irritas facere aut abrogare. Curia, contra, tantummodo legem Constitutioni superponit; si lex huic se accommodat, lex est valida; si non, lex est nulla lex. Ita est saltem nostra ratio gubernationis popularis. (Non obliviscimur, scilicet, iudices *humanos*, et saepe sui iudicii nimis pertinaces esse!)

Mox videbimus, pol, utrum Praeses vincat, an decore postulationibus Populi ac principiis Libertatis cedat.

Quid *tu* censes?

THE INQUISITORIAL POWER OF CONGRESS

Scope of Power of Inquiry as Disclosed by Decisions of the Supreme Court of the United States—Although It Has Been Exercised by Both Houses of Congress almost from the Beginning of the Government under the Constitution, It Was not until 1881 That the Supreme Court Had Occasion to Consider It—Lack of Power in Congress to Compel Disclosures of "Local" Matters in Aid of Power to Propose Constitutional Amendments—Inquisitorial Powers of Administrative Agencies Created by Congress—Rights of Citizens Relative to Congressional Investigation—Power of Each House of Congress to Punish Contempts.

By Bryce L. Hamilton
Member of the Chicago Bar

I.

NOWHERE in the Constitution is there any express grant of power to either house of Congress to conduct investigations in aid of its constitutional functions. Although the power to obtain information had been exercised by both houses of Congress almost from the beginning of the government under the Constitution,[1] it was not until 1881 that the Supreme Court, in *Kilbourn* v. *Thompson*,[2] had occasion to consider the power. The United States, as a result of deposits made by the Secretary of the Navy, was one of the creditors of Jay Cooke & Company, whose estate was in the course of administration in a federal court of bankruptcy. A resolution of the House of Representatives, after reciting in the preamble the making of a settlement by the trustee in bankruptcy of the bankrupts' interest in a real-estate pool to the alleged disadvantage of the creditors and that the courts were powerless to give the creditors adequate redress, authorized a committee to inquire into the real-estate pool and the settlement, and empowered it to send for persons and papers. Kilbourn was committed to jail by the House for refusal to answer questions and produce documents at the inquiry. He brought an action against the Sergeant-at-Arms of the House for false imprisonment.[3]

The Court, by Mr. Justice Miller, said "that no person can be punished for contumacy as a witness before either House, unless his testimony is required in a matter into which that House has jurisdiction to inquire," and that neither house of Congress "possesses the general power of making inquiry into the private affairs of the citizen." The estate of the bankrupts and the settlement, the Court pointed out, were pending in a court of competent jurisdiction which had ample power to protect the rights of the Government and other creditors. The Court stated that the resolution contained "no hint" of any legislative purpose, and that no suggestion had been made as to what the House or Congress could have done to aid the creditors. The preamble and body of the resolution led the Court to conclude that the House of Representatives had exceeded its authority by invading the judicial field.[4] The Court recognized that each house of Congress has implied powers of inquiry. In exercising the power to judge of the elections and qualifications of its members, each house, the Court said, "has an undoubted right to examine witnesses and inspect papers." The Court also saw "no reason to doubt" the power of each house "acting in its appropriate sphere" in an impeachment "to compel the attendance of witnesses, and their answer to proper questions, in the same manner and by the use of the same means that courts of justice can in like cases."

The power of the Senate to investigate charges reflecting upon the integrity of its members was considered and upheld in *In re Chapman*.[5] Chapman was convicted in the courts of the District of Columbia under an act of 1857 for refusing to answer questions pertinent to the investigation, and, on leave, filed a petition for a writ of habeas corpus in the Supreme Court of the United States. Chief Justice Fuller, after referring to the constitutional power of the Senate to discipline and expel its members, said the Senate "obviously had jurisdiction of the subject-matter of the inquiry it directed, and power to compel the attendance of witnesses, and to require them to answer any question pertinent thereto." "Nor will it do," said the Chief Justice, "to hold that the Senate had no jurisdiction to pursue the particular inquiry because the preamble and resolutions did not specify that the proceedings were taken for the purpose of censure or expulsion, if certain facts were disclosed by the investigation." The Court held it could not assume on the record before it "that the action of the Senate was without a legitimate object," and that "it was certainly not necessary that the resolutions should declare in ad-

1. The first committee of inquiry was appointed by the House in 1792 to investigate the defeat of General St. Clair's expedition in the Northwest. 3 Ann. Cong. 490-494.

2. 103 U. S. 168.

3. Kilbourn also sued the members of the House committee who had initiated the contempt proceeding and procured the passage of the resolution ordering his commitment. These defendants were held to be protected by Art. I, sec. 6, of the Constitution, which provides that "for any speech or debate in either house," Senators and Representatives "shall not be questioned in any other place." The Court held that the constitutional provision was not to be narrowly construed, and that it included the making of reports, offering of resolutions and voting.

4. Kilbourn eventually recovered a substantial amount of damages. See *In re Pacific Railway Commission*, 32 Fed. 241, 253.

5. 166 U. S. 661 (1897).

trust in the president was the most important cause of the loss. There is here no unjust enrichment as the result of the entire transaction. Nor can liability be predicated upon the fraud of an agent, qua agent, since the borrowing was done as an individual so that it differs from the case where one, while dealing with a third person as agent, by fraud obtains property for his principal, in which case the defrauded person is given a preference if the money or securities can be traced. The stockholders, however, who permitted the continuance of a situation in which one person was in complete control should not be able to object to the granting of a preference.

Socrates Questions Stranger as to Political Situation in His Country—An Alleged Ancient Latin Manuscript Appears to Deal with Supreme Court Issue

CONSIDERING the interest which the Supreme Court issue has aroused in all quarters, it is not surprising to find that it has received the attention of the Chicago Classical Club, an organization whose name sufficiently describes it. An announcement of its closing meeting on May 8 has come to hand, and it contains certain matter bearing upon this important question.

"As classical people do not live exclusively in the past, but are keenly alive also to the problems of the present", says the announcement, "the Club may be permitted to print herewith two remarkable compositions with a bearing on today's controversies (as to the merits of which the Club of course expresses no opinion.) The second is obviously from the hand of Cicero. . . Over against this we may set a short fragment said to be copied from a recently discovered papyrus . . . in which Socrates questions a native of the lost continent of Atlantis, beyond the pillars of Hercules, regarding the political situation there. . ."

Following are these two contributions to the rapidly growing literature on the subject. A translation of the Socratic dialogue is appended for the benefit of readers who may have mislaid their Greek:

Σ ω κ ρ ά τ η ς· πόθεν δὴ ἥκεις, ὦ ξένε, εἰς τήνδε τὴν γῆν;

Ξ έ ν ο ς· ἴσως ἤδη ἤκουσας νῆσόν τινα 'Ατλάντιδα καλουμένην κεῖσθαι ἔξω τῶν 'Ηρακλειῶν στηλῶν.

Σ ω κ ρ ά τ η ς· πάνυ μὲν οὖν.

Ξ έ ν ο ς· ἐντεῦθεν ἀφῖγμαι, ὦ Σώκρατες, δεδιὼς στάσιν καὶ πόλεμον ἐπιδήμιον κρυόεντα.

Σ ω κ ρ ά τ η ς· τὶ οὖν μαθόντες στασιάζουσι οἱ νησιῶται; δημοκρατοῦνται ἢ ἀριστοκρατοῦνται;

Ξ έ ν ο ς· ἡ πολιτεία λόγῳ μὲν δημοκρατία, ἔργῳ δὲ ὑπ' ἐννέα γερόντων ἀρχή. αὕτη μὲν οὖν ἡ γερουσία καλεῖται δικαστήριον κράτιστον καὶ ἀξιοῖ δοκιμάζειν πάντας τοὺς νόμους οὓς ἑκάστοτε τιθέασιν ἥ βουλὴ καὶ ἡ ἐκκλησία. καὶ δὴ πολλοὺς ἀποδοκιμάζει.

Σ ω κ ρ ά τ η ς· ἆρα οὐ διὰ ταῦτα ἀγανακτεῖ ὁ δῆμος;

Ξ έ ν ο ς· μάλιστα, ἀλλὰ πολλοὶ δεδοίκασι μὴ ὁ προστάτης τοῦ δήμου ἐκβάλῃ τοὺς πρεσβυτέρους ἐκ τοῦ δικαστηρίου καὶ πείθῃ τὴν βουλὴν αἱρεῖσθαι ἄλλους οἳ ποιήσουσιν ὅ τι ἂν βούληται ὁ προστάτης.

Σ ω κ ρ ά τ η ς· ἆρα οὐ οὗτος ὁ προστάτης γενήσεται τύραννος;

Ξ έ ν ο ς· οἱ μὲν ταῦτα λέγουσιν, οἱ δὲ ἄλλως.

TRANSLATION

SOCRATES: Whence have you come, stranger, to this land?

STRANGER: Well, perhaps you have heard that a certain island called Atlantis lies beyond the Pillars of Hercules?

SOCRATES: Yes, indeed.

STRANGER: I have come thence, Socrates, fearing a revolution and a bloody civil war.

SOCRATES: What have the islanders heard, that makes them think of a revolution? Are they under a democratic or an aristocratic form of government?

STRANGER: The constitution is a democracy in theory, but in fact there is a government by nine old men. Now, this group of old men is called the Supreme Court and it has the power to disallow all the laws which the Senate and the Assembly pass from time to time; and indeed it does disallow many.

SOCRATES: Are not the people disturbed at these things?

STRANGER: Very much so, but many fear lest the president of the people cast out the older men from the Court and persuade the legislature to choose others who will do whatever the president wishes.

SOCRATES: Why, will not this president become a dictator?

STRANGER: Some say so, others the opposite.

DE CURIA SUMMA AMERICANA

De Curia Summa Americana tempore praesenti multum agitur. Alius aliud magno clamore blaterat. Multi affirmant Praesidem velle, eligentem et addentem Curiae sex natu minores iudices, obsequiosos fidosque sibi, perficere ut sua consilia, suae sententiae praevaleant; hoc ducturum ad maiestatem dictatoriam.

Alii autem clamorem aeque clarum tollunt illos Novem Senes, qui nunc Sella Suprema sedeant, iam mentes sanas in sanis corporibus habere, iam satis doctos et iure peritos esse; nefas cogere eos recedere.

Pro deum fidem, quid credamus?

Plerique ex nobis, audeo dicere, fortasse sentiunt Praesidem extra modum et extra hos cancellos esse egressum, quos Constitutio Americana statuerit; oportere ut Praesidi sit cura sola legum *administrandarum*—nunquam *scribendarum*.

Verum immortale scripsit olim poeta:

"Tempora mutantur, nos et mutamur in illis."

Esto. At tamen, per omnes deos qui pedibus Olympum magnum pulsant, si forte Constitutio nostra mutanda est, sit mutanda maximopere Populo Americano modo praescripto, haudquaquam minimopere Praeside, qui nihil aliud est nisi *Legatus, Servus, Dux* populi—minime *Rex, Imperator, Dictator*.

Erramus, puto, si credimus Curiam Summam leges aut scribere aut rescindere aut irritas facere aut abrogare. Curia, contra, tantummodo legem Constitutioni superponit; si lex huic se accommodat, lex est valida; si non, lex est nulla lex. Ita est saltem nostra ratio gubernationis popularis. (Non obliviscimur, scilicet, iudices *humanos*, et saepe sui iudicii nimis pertinaces esse!)

Mox videbimus, pol, utrum Praeses vincat, an decore postulationibus Populi ac principiis Libertatis cedat.

Quid *tu* censes?

THE INQUISITORIAL POWER OF CONGRESS

Scope of Power of Inquiry as Disclosed by Decisions of the Supreme Court of the United States—Although It Has Been Exercised by Both Houses of Congress almost from the Beginning of the Government under the Constitution, It Was not until 1881 That the Supreme Court Had Occasion to Consider It—Lack of Power in Congress to Compel Disclosures of "Local" Matters in Aid of Power to Propose Constitutional Amendments—Inquisitorial Powers of Administrative Agencies Created by Congress—Rights of Citizens Relative to Congressional Investigation—Power of Each House of Congress to Punish Contempts.

By Bryce L. Hamilton
Member of the Chicago Bar

I.

NOWHERE in the Constitution is there any express grant of power to either house of Congress to conduct investigations in aid of its constitutional functions. Although the power to obtain information had been exercised by both houses of Congress almost from the beginning of the government under the Constitution,[1] it was not until 1881 that the Supreme Court, in *Kilbourn* v. *Thompson*,[2] had occasion to consider the power. The United States, as a result of deposits made by the Secretary of the Navy, was one of the creditors of Jay Cooke & Company, whose estate was in the course of administration in a federal court of bankruptcy. A resolution of the House of Representatives, after reciting in the preamble the making of a settlement by the trustee in bankruptcy of the bankrupts' interest in a real-estate pool to the alleged disadvantage of the creditors and that the courts were powerless to give the creditors adequate redress, authorized a committee to inquire into the real-estate pool and the settlement, and empowered it to send for persons and papers. Kilbourn was committed to jail by the House for refusal to answer questions and produce documents at the inquiry. He brought an action against the Sergeant-at-Arms of the House for false imprisonment.[3]

The Court, by Mr. Justice Miller, said "that no person can be punished for contumacy as a witness before either House, unless his testimony is required in a matter into which that House has jurisdiction to inquire," and that neither house of Congress "possesses the general power of making inquiry into the private affairs of the citizen." The estate of the bankrupts and the settlement, the Court pointed out, were pending in a court of competent jurisdiction which had ample power to protect the rights of the Government and other creditors. The Court stated that the resolution contained "no hint" of any legislative purpose, and that no suggestion had been made as to what the House or Congress could have done to aid the creditors. The preamble and body of the resolution led the Court to conclude that the House of Representatives had exceeded its authority by invading the judicial field.[4] The Court recognized that each house of Congress has implied powers of inquiry. In exercising the power to judge of the elections and qualifications of its members, each house, the Court said, "has an undoubted right to examine witnesses and inspect papers." The Court also saw "no reason to doubt" the power of each house "acting in its appropriate sphere" in an impeachment "to compel the attendance of witnesses, and their answer to proper questions, in the same manner and by the use of the same means that courts of justice can in like cases."

The power of the Senate to investigate charges reflecting upon the integrity of its members was considered and upheld in *In re Chapman*.[5] Chapman was convicted in the courts of the District of Columbia under an act of 1857 for refusing to answer questions pertinent to the investigation, and, on leave, filed a petition for a writ of habeas corpus in the Supreme Court of the United States. Chief Justice Fuller, after referring to the constitutional power of the Senate to discipline and expel its members, said the Senate "obviously had jurisdiction of the subject-matter of the inquiry it directed, and power to compel the attendance of witnesses, and to require them to answer any question pertinent thereto." "Nor will it do," said the Chief Justice, "to hold that the Senate had no jurisdiction to pursue the particular inquiry because the preamble and resolutions did not specify that the proceedings were taken for the purpose of censure or expulsion, if certain facts were disclosed by the investigation." The Court held it could not assume on the record before it "that the action of the Senate was without a legitimate object," and that "it was certainly not necessary that the resolutions should declare in ad-

1. The first committee of inquiry was appointed by the House in 1792 to investigate the defeat of General St. Clair's expedition in the Northwest. 3 Ann. Cong. 490-494.

2. 103 U. S. 168.

3. Kilbourn also sued the members of the House committee who had initiated the contempt proceeding and procured the passage of the resolution ordering his commitment. These defendants were held to be protected by Art. I, sec. 6, of the Constitution, which provides that "for any speech or debate in either house," Senators and Representatives "shall not be questioned in any other place." The Court held that the constitutional provision was not to be narrowly construed, and that it included the making of reports, offering of resolutions and voting.

4. Kilbourn eventually recovered a substantial amount of damages. See *In re Pacific Railway Commission*, 32 Fed. 241, 253.

5. 166 U. S. 661 (1897).

vance what the Senate meditated doing when the investigation was concluded." The Court also held that Congress had power to enact a statute to compel the attendance of witnesses and the disclosure of evidence at inquiries conducted by either house, and said the statute providing punishment for contumacy and the power of each house to punish contempts were "*diverso intuitu* and capable of standing together."

It was not until 1927, in *McGrain* v. *Daugherty*,[6] that the Supreme Court was called upon to decide whether either house of Congress had power, by its own process, to compel disclosures of fact in aid of its power to legislate. A Senate resolution directed a committee to investigate the activities and conduct of the Department of Justice under Attorney General Harry M. Daugherty, and authorized the committee to subpoena witnesses and papers. Mally S. Daugherty, a brother of the Attorney General, failed to appear in response to subpoenas, and the Senate directed the issuance of a warrant commanding that he be brought before it to answer questions pertinent to the inquiry. Daugherty was taken into custody, and a habeas corpus proceeding followed.

The Court, through Mr. Justice Van Devanter, pointed out that the power to secure necessary information was "treated as an attribute of the power to legislate" by the British Parliament and Colonial legislatures before the Revolution and that this view had been followed in Congress and most of the state legislatures and was sustained by decisions of state courts. Two propositions, the Court said, were definitely settled: "One, that the two houses of Congress, in their separate relations, possess not only such powers as are expressly granted to them by the Constitution, but such auxiliary powers as are necessary and appropriate to make the express powers effective; and, the other, that neither house is invested with 'general' power to inquire into private affairs and compel disclosures, but only with such limited power of inquiry as is shown to exist when the rule of constitutional interpretation just stated is rightly applied." It was held "that the power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function." The absence of an express avowal in the resolution providing for the investigation of a purpose in aid of legislation was held not fatal. The Court stated that this resolution showed that the subject of the inquiry was one on which Congress could legislate, and said: "The only legitimate object the Senate could have in ordering the investigation was to aid it in legislating; and we think the subject-matter was such that the presumption should be indulged that this was the real object." The possibility that crime or other wrongdoing on the part of the Attorney General might be disclosed was held to be no reason for declaring that the inquiry was beyond the power of the Senate. The Court concluded that Daugherty was lawfully attached and bound to answer pertinent questions.

In the *Chapman* and *Daugherty* cases the Court was willing to presume that the objects of the inquiries were legitimate even though the authorizing resolutions contained no express declaration of purpose. This it had refused to do in the *Kilbourn* case. In the *Chapman* case the matter under inquiry was plainly within the jurisdiction of the Senate, and it was necessary for the Senate to ascertain the truth of the charges made before it could determine whether any action against its members was warranted. The resolution in the *Daugherty* case showed on its face that the subject of investigation was the administration of a department of the Government. The House of Representatives might have ascertained facts in an investigation of the real-estate pool and settlement referred to in the *Kilbourn* case which would have aided it in enacting legislation respecting deposits of public funds and bankruptcy, but the preamble and body of the resolution affirmatively indicated that the real purpose was to investigate a matter pending in a federal court.[7]

The power of the Senate to investigate alleged improper practices in connection with the election of a United States Senator was discussed in *Reed* v. *County Commissioners*.[8] An investigating committee was empowered by resolutions of the Senate to subpoena persons and papers, "to do such other acts as may be necessary in the matter of said investigation," and to impound the records relating to the election of William S. Vare as a United States Senator. An agent of the committee demanded these records from the state authorities, and after the demand was refused the committee and its agent filed a bill to compel their surrender. The Court, through Mr. Justice Butler, said that the power of the Senate to judge of the elections, returns and qualifications of its members "carries with it authority to take such steps as may be appropriate and necessary to secure information upon which to decide concerning elections." The precise holding of the case is that the resolutions, when construed in the light of the circumstances of the case and the practice of the Senate to employ its own power to obtain evidence, did not authorize the committee to invoke the aid of the courts.

The inquisitorial power of Congress was again before the Supreme Court in *Sinclair* v. *United States*.[9] Charges of fraud and bad faith in connection with the making of a lease of certain naval oil reserve lands to the Mammoth Oil Company and a contract for the sale of oil from other reserve lands to another company had come to the attention of the Senate. Resolutions were adopted which directed a standing committee "to investigate this entire subject of leases upon naval oil reserves with particular reference to the protection of the rights and equities of the Government of the United States and the preservation of its natural resources," empowered the committee to compel the attendance of witnesses and the production of papers, and directed it to "ascertain what, if any, other or additional legislation may be advisable." Harry F. Sinclair, president of the Mammoth Oil Company, refused to answer a question respecting a contract which directly related to rights in lands covered by its lease, and was indicted under the statute[10] for contumacy. In an opinion by Mr. Justice Butler, the conviction in the trial court was upheld.

The Court pointed out that the Constitution gave Congress power to dispose of and make all needful rules and regulations respecting the property of the United States, and said that the transaction by which reserve lands were purportedly leased to the Mammoth Oil Company was a matter affecting the title to Gov-

6. 273 U. S. 135.

7. In the *Child Labor Tax Case*, 259 U. S. 20, 37, Mr. Chief Justice Taft said: ". . . in the act before us, the presumption of validity cannot prevail, because the proof of the contrary is found on the very face of its provisions." See also *Hill* v. *Wallace*, 259 U. S. 44, 66; and *United States* v. *Butler*, 297 U. S. 1, 58, 59, 61.

8. 277 U. S. 376 (1928).

9. 279 U. S. 263 (1929).

10. R. S. sec. 102; 2 U. S. C. A. sec. 192.

ernment lands. "The validity of the lease and the means by which it had been obtained under existing law," the Court said, "were subjects that properly might be investigated in order to determine what if any legislation was necessary or desirable in order to recover the leased lands or to safeguard other parts of the public domain." The Court was willing to concede that Congress could not require disclosures for the purpose of assisting the prosecution of pending suits instituted by the Government for the cancellation of oil leases and contracts, but held that the power of Congress "to require pertinent disclosures in aid of its own constitutional power is not abridged because the information sought to be elicited may also be of use in such suits." The question propounded to Sinclair was held pertinent to the inquiry into the rights and equities of the United States in the reserve lands, over which, the Court said, Congress, in addition to its legislative powers, "had all the powers of a proprietor." Furthermore, the Court declared: "The question propounded was within the authorization of the committee and the legitimate scope of investigation to enable the Senate to determine whether the powers granted to or assumed by the Secretary of the Interior and the Secretary of the Navy should be withdrawn, limited, or allowed to remain unchanged."

Shortly after rendering its decision in the *Sinclair* case the Supreme Court decided *Barry* v. *United States*,[11] which, like *Reed* v. *County Commissioners*, was a case growing out of an inquiry into the validity of the election of William S. Vare to the United States Senate. Cunningham, a political supporter of Vare, had repeatedly refused to answer certain questions before the investigating committee on the ground they involved his personal affairs. The Senate issued a warrant commanding its Sergeant-at-Arms to produce Cunningham before the Senate to answer questions pertinent to the inquiry. The case reached the Supreme Court in a habeas corpus proceeding against the Sergeant-at-Arms. The Court, through Mr. Justice Sutherland, said that the power of the Senate to pass upon the elections, qualifications and returns of its members was judicial in nature and "necessarily involves the ascertainment of facts, the attendance of witnesses, the examination of such witnesses, with the power to compel them to answer pertinent questions, to determine the facts and apply the appropriate rules of law, and, finally, to render a judgment which is beyond the authority of any other tribunal to review." The Court said that the Senate could "devolve upon a committee of its members the authority to investigate and report,"[12] and "for any reason satisfactory to it and at any stage of the proceeding, may resume charge of the inquiry and conduct it to a conclusion or to such extent as it may see fit." "In that event," the Court proclaimed, "the limitations put upon the committee obviously do not control the Senate; but that body may deal with the matter, without regard to these limitations, *subject only to the restraints imposed by or found in the implications of the Constitution.*"[13] It was held that the Senate, in the exercise of a sound discretion, could issue a warrant without having first issued a subpoena where, as in this case, it had good reason to think the witness would not otherwise appear.[14]

II.

Among the powers conferred upon Congress by the Constitution is the power to propose constitutional amendments whenever two-thirds of both houses deem them necessary. Amendments proposed by Congress become effective only when ratified by the legislatures of three-fourths of the states or conventions in three-fourths of the states, depending upon the mode of ratification proposed by Congress.[15] The question whether the expressly granted power to propose amendments to the fundamental law carries with it by implication authority to employ compulsory means to obtain information has never been presented to the courts.

The power of the Parliament of Australia to compel disclosures of matters not within the scope of existing federal power to pass binding laws was denied by the Privy Council of Great Britain in *Attorney General* v. *Colonial Sugar Refining Co.*[16] The case was an action brought to restrain a Royal Commission appointed under the authority of acts of the Australian Parliament from proceeding with a sweeping investigation of the affairs of the Colonial Sugar Refining Company. After stating that two of the Justices of the High Court of Australia had expressed the opinion "that the inquiries directed by the Commission might well be relevant to the question of the desirability of a change in the Constitution," the Privy Council said that the answers to this argument given by the Chief Justice and Justice Barton of the High Court of Australia were conclusive. "No such power of changing the Constitution, and thereby bringing new subjects within the legislative authority of the Commonwealth Parliament, has been actually exercised," the Privy Council concluded, "and until it has been it cannot be prayed in aid." The opinion of Chief Justice Griffiths of the High Court of Australia is convincing. Among other things he said: "The argument proves too much. It implicitly denies the whole doctrine of distribution of powers between the Commonwealth and the States, which is the fundamental basis of the federal compact. If it is sound, every inhabitant of the Commonwealth is liable to an inquisitorial investigation conducted under the federal power as to his most intimate private affairs, and as to all his doings in the large sphere of action reserved to the States by the Constitution."[17]

The inquisitorial power of each house of Congress is an implied auxiliary power. An attempt by either house to use compulsory means to obtain facts in an

11. 279 U. S. 597 (1929).

12. In the *Daugherty* case, 273 U. S. at 181, the Court intimated that the House might not have power to authorize a committee to sit beyond the session, but said this rule could not well apply to the Senate because it was a continuing body. Congress apparently holds a different opinion as to the power of the House. 2 U. S. C. A., Pocket Part, sec. 194. The intimation of the Supreme Court is supported by many state authorities. *Brown* v. *Brancato* (Pa.) 184 Atl. 89; *Fergus* v. *Russel* (Ill.) 110 N. E. 130; *Ex Parte Caldwell* (W. Va.) 55 S. E. 910; *State* v. *Childers* (Okla.) 215 Pac. 773; and cases cited.

Dean Wigmore states that the power delegated to a committee "is limited to the committee acting as such," and suggests "that a question by a single member only of the committee, or by a subcommittee, need not be answered." Wigmore on Evidence (2d Ed.), 1934 Supp., sec. 2195, p. 959. Cf. *In re Leach*, 189 N. Y. S. 352; affirmed 134 N. E. 588.

13. Emphasis supplied.

14. In *United States* v. *Norris* (U. S. Sup. Ct., Mar. 29, 1937) it was recently held that the Senate had power to investigate the campaign expenditures of candidates for the Senate "with a view to possible exercise of its legislative function or possible discharge of its duty to determine the validity of the election of its members."

15. Const. Art. V.

16. Appeal Cases 1914, 237.

17. 15 C. L. R. 182, 194-195. Justice Barton held similar views. Id. at 206-208.

investigation of "local" fields would not be compatible with the dual nature of our government. The mere power to propose a change in the existing distribution of powers is not the character of power which should carry with it by implication power to conduct a compulsory inquiry into "local" matters for the purpose of determining whether an amendment to the fundamental law should be proposed or what form it should take.[18] The dual system of federal and state governments established by the Constitution, it is believed, by necessary implication[19] forbids the national legislature from compelling disclosures at an inquiry into fields of action now reserved to the states or the people even though the inquiry is conducted in aid of the power to propose constitutional amendments.[20]

III.

Decisions of the courts involving the inquisitorial powers of federal administrative commissions throw considerable light upon the Congressional power of inquiry. Such decisions were cited as authorities in both the *Daugherty*[21] and *Sinclair*[22] cases. The powers of federal commissions, it must be borne in mind, are only those conferred by statute; whereas the investigative powers of each house of Congress are granted by implication in the Constitution and cover a broader field.

A case often cited with approval by the Supreme Court is *In re Pacific Railway Commission*.[23] Acting under a statute the Commission, created by act of Congress, undertook a sweeping investigation of the affairs of railroads which had received federal aid. Upon the refusal of the president of one of these carriers to answer certain interrogatories, the Commission applied to the Circuit Court for the Northern District of California under the statute for an order requiring him to answer. The Court refused to issue the order principally on the ground that the petition of the Commission did not present a case or controversy of which the federal courts could take cognizance. Circuit Judge Sawyer, who wrote one of the three opinions, said: "A general, roving, offensive, inquisitorial, compulsory investigation, conducted by a commission without any allegations, upon no fixed principles, and governed by no rules of law, or of evidence, and no restrictions except its own will, or caprice, is unknown to our constitution and laws; and such an inquisition would be destructive of the rights of the citizen, and an intolerable tyranny. Let the power once be established, and there is no knowing, where the practice under it would end."

The power of Congress to confer upon the federal courts authority to compel persons to testify and to produce documents before an administrative body was upheld by a divided court in *Interstate Commerce Commission* v. *Brimson*,[24] and to this extent the decision in the *Pacific Railway Commission* case was overruled. Mr. Justice Harlan, who wrote the majority opinion, was careful to point out, however, that the Interstate Commerce Commission, in exercising its statutory powers of investigation, was bound by constitutional limitations designed to protect personal rights, and then stated: "Neither branch of the legislative department, still less any merely administrative body, established by Congress, possesses, or can be invested with, a general power of making inquiry into the private affairs of the citizen. . . . the principles that embody the essence of constitutional liberty and security forbid all invasions on the part of the government and its employes of the sanctity of a man's home, and the privacies of his life."

The inquisitorial powers of the Interstate Commerce Commission were before the Supreme Court again in *Harriman* v. *Interstate Commerce Commission*,[25] a case arising upon a petition of the Commission for an order to compel witnesses to answer certain questions in an investigation of railroad combinations and practices. The Commission contended its statutory power was broad enough to authorize it to make any investigation it deemed proper to aid it in recommending additional legislation to Congress relating to interstate and foreign commerce. Mr. Justice Holmes, who delivered the majority opinion, refused to believe that Congress had given an administrative agency power to summon witnesses from any place in the country "and require them to disclose any facts, no matter how private, no matter what their tendency to disgrace the person whose attendance has been compelled." The Court construed the Interstate Commerce Act as it then read as confining the power to compel testimony "to the only cases where the sacrifice of privacy is necessary—those where the investigations concern a specific breach of the law."

The question whether the Interstate Commerce Commission, under its statutory power to examine "all accounts, records and memoranda kept by carriers," or under the authority of a Senate resolution directing it to investigate the affairs of the carrier, could inspect the correspondence of the carrier, some of which contained confidential communications between itself and its attorneys, was presented in *United States* v. *Louisville and Nashville R. Co.*[26] The Court, in an opinion by Mr. Justice Day, regarded the act of Congress as the sole source of the Commission's authority because the resolution had been passed by only one branch of Congress and neither the Government nor the Commission was relying upon it as a source of authority.[27] The Court was unwilling to ascribe to Congress an intention to authorize an administrative board to search

18. The power to propose constitutional amendments is not the only power of Congress which is subject to approval of the states. The power of Congress to admit new states into the Union is limited by the requirement that "no new state shall be formed or erected within the jurisdiction of any other state; nor any state be formed by the junction of two or more states, or parts of states, without the consent of the legislatures of the states concerned as well as of the Congress." Const. Art. IV, sec. 3. The effective exercise of this power, however, is conditioned only upon the legislative consent of the state or states concerned.

19. Chief Justice Hughes in *Willcuts* v. *Bunn*, 282 U. S. 216, 224-225: ". . . a tax upon the instrumentalities of the States is forbidden by the Federal Constitution, the exemption resting upon necessary implication in order effectively to maintain our dual system of government." See also *Brush* v. *Commissioner of Internal Revenue* (U. S. Sup. Ct., Mar. 15, 1937); *Ashton* v. *Cameron County District*, 298 U. S. 513; and *Carter* v. *Carter Coal Co.*, 298 U. S. 238, 295. Cf. *United States* v. *Owlett* (D. C. Pa.), 15 F. Supp. 736.

20. A different question would be presented if the inquiry were held for the purpose of enabling Congress to determine whether an amendment should be proposed to transfer a federal power to the states.

21. 273 U. S. at 174.

22. 279 U. S. at 292-294.

23. 32 Fed. 241 (1887).

24. 154 U. S. 447 (1894). See 155 U. S. 3 for dissenting opinion.

25. 211 U. S. 407 (1908).

26. 236 U. S. 318 (1915).

27. It is now settled that a resolution of one house can confer no authority upon an administrative body. *Federal Trade Commission* v. *American Tobacco Co.*, 264 U. S. 298, 305; *United States* v. *Nashville, C. & St. L. Ry. Co.*, 217 Fed. 254, 260.

all the correspondence of the carrier. "A sweeping provision of that nature, attended with such consequences," the Court felt, "would not be likely to have been enacted without probable exceptions as to some lines of correspondence required to be kept open and subject to inspection upon demand of the agents of the Government."[28]

The power of the Interstate Commerce Commission to investigate the business of a company not subject to the Interstate Commerce Act was presented to the Supreme Court in *Ellis* v. *Interstate Commerce Commission*[29] on a petition of the Commission to compel answers to questions put to an officer of Armour Car Lines in the course of an investigation of allowances paid by railroads for the use of private cars. The Commission wished to ascertain whether the car line company was controlled by Armour & Company, a shipper, and used by the latter as a device to obtain concessions from the carriers. Mr. Justice Holmes declared that the Commission had no power to make "a fishing expedition into the affairs of a stranger for the chance that something discreditable might turn up;" and ruled that the car line company was in the position of an ordinary witness, and that its private affairs could not be inquired into until it was "shown to be merely the tool of Armour & Company."

One of the outstanding decisions of the Supreme Court relating to the inquisitorial powers of administrative tribunals is *Federal Trade Commission* v. *American Tobacco Company*.[30] The petitions for writs of mandamus brought by the Federal Trade Commission prayed that unless the respondents would submit all their records and papers for inspection a mandamus issue requiring them to exhibit all telegrams and letters sent to and received from their jobber customers during the period of one year and one of them to exhibit in addition a large mass of other documents. The Commission's claim to an unlimited right of examination met with complete disfavor. "The mere facts of carrying on a commerce not confined within state lines and of being organized as a corporation," Mr. Justice Holmes said, "do not make men's affairs public, as those of a railroad company now may be. . . . Anyone who respects the spirit as well as the letter of the Fourth Amendment would be loath to believe that Congress intended to authorize one of its subordinate agencies to sweep all our traditions into the fire. . . , and to direct fishing expeditions into private papers on the possibility that they may disclose evidence of crime. We do not discuss the question whether it could do so if it tried, as nothing short of the most explicit language would induce us to attribute to Congress that intent. . . . It is contrary to the first principles of justice to allow a search through all the respondents' records, relevant or irrelevant, in the hope that something will turn up." The right of access given by the Federal Trade Commission Act was held to be limited to evidentiary documents, and it was said that some ground must be laid for believing that the papers demanded contained material evidence.

The most recent expression of the Supreme Court respecting the inquisitorial powers of federal administrative agencies is the majority opinion delivered by Mr. Justice Sutherland in *Jones v. Securities & Exchange Commission*.[31] One of the questions presented was whether the Commission could investigate a registration statement filed by Jones after it had been withdrawn. "An official inquisition to compel disclosures of fact," Mr. Justice Sutherland announced, "is not an end, but a means to an end; and it is a mere truism to say that the end must be a legitimate one to justify the means. The citizen, when interrogated about his private affairs, has a right before answering to know why the inquiry is made; and if the purpose disclosed is not a legitimate one, he may not be compelled to answer. Since here the only disclosed purpose for which the investigation was undertaken had ceased to be legitimate when the registrant rightfully withdrew his statement, the power of the commission to proceed with the inquiry necessarily came to an end." The learned Justice remarked that "the grand jury abides as the appropriate constitutional medium for the preliminary investigation of crime and the presentment of the accused for trial." Continuing he said: "The philosophy that constitutional limitations and legal restraints upon official action may be brushed aside upon the plea that good, perchance, may follow, finds no countenance in the American system of government. An investigation not based upon specified grounds is quite as objectionable as a search warrant not based upon specific statements of fact. Such an investigation, or such a search, is unlawful in its inception and cannot be made lawful by what it may bring, or by what it actually succeeds in bringing, to light."

Mr. Justice Cardozo in his dissenting opinion[32] pointed out that the majority opinion failed to state the constitutional immunity on which the decision rested. The opinion of the majority, however, would seem to be supported by the due process clause of the Fifth Amendment. Jones would have been compelled to leave his home and business and submit to interrogation by a governmental agency when "the only disclosed purpose for which the investigation was undertaken had ceased to be legitimate." Where a person has information which is needed in the administration of justice or in the exercise of the law-making power or other proper governmental functions there is a reasonable necessity for the infringement of his liberty; but in cases where disclosure would serve no legitimate purpose, the invasion of personal liberty is arbitrary and unreasonable.[33]

IV.

The rights of persons called upon to testify or to produce papers at a Congressional investigation are not yet entirely clear. The decisions of the Supreme Court justify certain conclusions. A citizen cannot be required to submit to a general inquiry into his purely private affairs or to an inquiry into matters outside the jurisdiction of the house conducting the investigation.[34]

28. In 1920 the Interstate Commerce Commission was given a right of "access to all accounts, records, and memoranda, including all documents, papers, and correspondence . . . kept or required to be kept by carriers. . . ." 41 Stat. 493; 49 U. S.C. A. sec. 20 (5).

29. 237 U. S. 434 (1915).

30. 264 U. S. 298 (1924).

31. 298 U. S. 1 (1936).

32. Justices Brandeis and Stone concurred in this dissent.

33. In the *Sinclair* case, 279 U. S. at 292, Mr. Justice Butler said: "It has always been recognized in this country, and it is well to remember, that few if any of the rights of the people *guarded by fundamental law* are of greater importance to their happiness and safety than the right to be exempt from all *unauthorized, arbitrary or unreasonable inquiries and disclosures* in respect of their personal and private affairs." (Emphasis supplied.)

34. Since each house has certain powers and duties which it exercises separately and independently of the other, there is necessarily a difference in the inquisitorial power possessed by each body.

He need not respond to a question or disclose a document which is not pertinent to an inquiry of a legislative character, and rights guaranteed him by the Constitution may not be infringed. As was declared in the *Daugherty* case,[35] "a witness rightfully may refuse to answer where the bounds of the power are exceeded or the questions are not pertinent to the matter under inquiry."[36]

Although a federal statute[37] provides that "No testimony given by a witness before either House, or before any committee of either House of Congress, shall be used as evidence in any criminal proceeding against him in any court, except in a prosecution for perjury committed in giving such testimony," it is believed that a witness can still claim the privilege against self-incrimination at a Congressional inquiry. In discussing the immunity granted by a similar statute, the Supreme Court in *Counselman* v. *Hitchcock*[38] pointed out that the act did no more than protect the witness "against the use of his testimony against him or his property in any prosecution against him or his property," and "could not, and would not, prevent the use of his testimony to search out other testimony to be used in evidence against him or his property." The Court held "that no statute which leaves the party or witness subject to prosecution after he answers the criminating question put to him, can have the effect of supplanting the privilege conferred by the Constitution," and that "a statutory enactment, to be valid, must afford absolute immunity against future prosecution for the offence to which the question relates."[39]

It is uncertain whether common law privileges of immunity not preserved by the Constitution are available in a Congressional investigation. The privilege against self-incrimination existing at common law is embodied in the Fifth Amendment and derives its force from that source. Other common law privileges, such as the privilege accorded confidential communications between husband and wife and attorney and client, are not preserved by any express provision of the Constitution. Although privileges such as these are by common law or statute part of the laws of the states, they are not as such binding upon Congressional committees sitting in the states; for the power of inquiry possessed by each house of Congress flows by implication from the Constitution itself, and hence cannot be restricted by state laws.[40] And though the common law is in force in the District of Columbia by virtue of an act of Congress,[41] still it cannot be doubted that Congress has no authority to divest either house of any part of its implied power of inquiry.[42] The character of inquisitorial power which can legitimately be implied in each house of Congress apparently affords the only basis for preserving well established privileges existing at common law which are not expressly preserved by the Constitution.[43]

It is difficult to believe that the framers of the Constitution intended that either house of Congress should have power to conduct investigations in a manner not in accord with Anglo-Saxon traditions.[44] The rule stated in the *Daugherty* case[45] is that each house has only "such limited power of inquiry" as is "necessary and appropriate to make the express powers effective." The powers of the courts in the administration of justice at common law would seem to be a reasonably safe guide to this limited power of inquiry possessed by each house of Congress, for the administration of justice is one of the most important functions of government.[46] This conclusion is fortified by the dictum in the *Kilbourn* case that in judging of the elections and qualifications of its members each house of Congress "has an undoubted right to examine witnesses and inspect

(*Continued on page* 561)

35. 273 U. S. at 176.

36. In the courts the relevancy of documents and testimony is no concern of the witness. Wigmore on Evidence (2d Ed.), sec. 2210. In Congressional proceedings of a legislative character there is no power to compel disclosures not pertinent to the inquiry. Id. 1934 Supp., sec. 2195; *Daugherty* case, *supra* note 35; *Sinclair* case, 279 U. S. at 292. In the *Barry* case, *supra* note 11, the Supreme Court appears to have committed itself to the view that either house in exercising a judicial function can only require disclosures of pertinent matters. In this case the warrant was issued for the purpose of having Cunningham brought before the Senate to answer questions pertinent to the inquiry. In the *Chapman* case, *supra* note 5, where the Senate investigation was at least quasi-judicial in character, the indictment was for refusal to answer pertinent questions.

37. R. S. sec. 859; 28 U. S. C. A. sec. 634.

38. 142 U. S. 547 (1892).

39. See also *McCarthy* v. *Arndstein*, 266 U. S. 34, 42; and *Arndstein* v. *McCarthy*, 254 U. S. 71, 73.

40. Cf. *United States* v. *Murdock*, 284 U. S. 141, 149; *Olmstead* v. *United States*, 277 U. S. 438, 469. Also see note 43 *infra*.

41. 31 Stat. 1189, c. 854, sec. 1.

42. In *In re Chapman*, 166 U. S. 661, 671-672, the Supreme Court said: "We grant that Congress could not divest itself, or either of its Houses, of the essential and inherent power to punish for contempt, in cases to which the power of either House properly extended. . . ." See also *Jurney* v. *MacCracken*, 294 U. S. 125, 151; and *Panama Refining Co.* v. *Ryan*, 293 U. S. 388, 421.

43. It will be remembered that in *Barry* v. *United States*, *supra* note 11, it was said that the Senate in conducting an inquiry itself was "subject only to the restraints imposed by or found in the implications of the Constitution."

44. Story was of the opinion that the rules of the common law "guide and check" impeachment proceedings. Respecting this he said: "The doctrine, indeed, would be truly alarming, that the common law did not regulate, interpret, and control the powers and duties of the court of impeachment. . . . It would be a most extraordinary anomaly, that while every citizen of every State originally composing the Union would be entitled to the common law as his birthright, and at once his protector and guide, as a citizen of the Union, or an officer of the Union, he would be subjected to no law, to no principles, to no rules of evidence. . . . Those who believe that the common law, so far as it is applicable, constitutes a part of the law of the United States in their sovereign character as a nation, not as a source of jurisdiction, but as a guide and check and expositor in the administration of the rights, duties, and jurisdiction conferred by the Constitution and laws, will find no difficulty in affirming the same doctrines to be applicable to the Senate as a court of impeachments." 1 Story on the Constitution (4th Ed.), sec. 798.

45. 273 U. S. at 173-174.

46. By R. S. sec. 103 (2 U. S. C. A. sec. 193) Congress has provided that "No witness is privileged to refuse to testify to any fact, or to produce any paper, respecting which he shall be examined by either House of Congress, or by any committee of either House, upon the ground that his testimony to such fact or his production of such paper may tend to disgrace him or otherwise render him infamous." This would seem to be an implied recognition by Congress that privileges not included in section 103 are to be observed in inquiries conducted by or under the authority of either house. In the *Chapman* case, *supra* note 5, the Supreme Court found it unnecessary to pass upon the constitutionality of this section. 166 U. S. at 666 and 667.

James M. Landis in an article in 40 Harvard L. Rev. 153, entitled "Constitutional Limitations on the Congressional Power of Investigation" states (p. 219): "Established privileges of immunity, of course, exist before such [Congressional] committees as well as before courts of law." Although he apparently refers to common law privileges, he unfortunately gives no reasons for his view. Dean Wigmore states that in actual practice the rules of the common law have sometimes been observed and sometimes not. Wigmore on Evidence (2d Ed.), 1934 Supp., secs. 4j and 4k. He expresses the opinion that Congress and other legislative bodies "are not bound by . . . the evidential rules that in judicial trials protect parties and witnesses and check abuses of power." Id. sec. 2195, p. 958.

THE RESTATEMENTS AS THEY WERE IN THE BEGINNING, ARE NOW, AND PERHAPS HENCEFORTH SHALL BE

A Serious Effort to Carry Out the Official Mandate to Make a Speech at the American Law Institute Banquet Containing Worth-While Thoughts Properly Garnished with Humor—"The Finest Thing about the Restatement as It Now Stands Is How Different It Was from What It Started Out to Be"—Gradual Decline of Institute Dogma and Various Steps Marking the Transition—The Battle of the Explanatory Notes and Subsequent and Further Intrusions of the Camel's Anatomy into the Institute Tent—Reportorial Difficulties—However, Present Situation Shows Institute Well on Road to Recovery from Early Ills—Broadening of Views of Reporters Due to Travel Advantages, etc.*

By W. Barton Leach
Professor of Law, Harvard Law School

MY invitation to speak here came in the form of a letter from Senator Pepper; and that letter contained very definite instructions—or, perhaps I should say in this city, a very definite mandate—which I should like to disclose in advance. I suppose that most of you have received a letter from Senator Pepper at one time or another; but it was a new and delightful experience to me. In the first place it comes upon paper of a very distinctive and pleasing size, definitely smaller and more genteel than we of the Boston bourgeoisie are used to. Then of course, the social register of Philadelphia is lined up at the upper left-hand corner. There's a first team of exactly eleven—apparently with Senator Pepper playing left end and a Stokes and a Pennypacker as the running guards—then a list of substitutes, equally patrician, except for a McCarthy who got in there either by mistake or to lend the common touch. But, of course, it was the substance of the letter that held the principal interest. This was even more delightful than the form. It was couched in that urbane and unctuous idiom that the gentlemen of the Senate used to acquire in the pre-Long era. Lest there be any doubt, let me say that I heartily approve. There's all too little of this sort of thing in the world. Reading a letter from Senator Pepper is the closest any human being is likely to come to the sensation which a dog has when his ears are being scratched. But after the warming glow of the first reading had worn off, I discovered the directive or mandate of which I have already spoken.

I was directed to produce something (and here I quote) "which, without being too undignified, will provide the diners with well-deserved entertainment—to put across a few worth-while thoughts with a sufficiently light touch and a sufficient supply of humor." I'm not quite sure that I grasp the significance of that reference to "well-deserved entertainment" although I have a general impression that if I were President Bryan (the preceding speaker) I'd resent it. However, strictly minding my own business, I find that I am required

a. to offer worth-while thoughts;
b. to provide a sufficient supply of humor;
c. to be undignified but not too undignified.

I assume, of course, that you, as listeners to this speech, have been given similar and correlative instructions in the performance of your part of the program—to be specific:

a. to listen sufficiently to my worth-while thoughts;
b. to laugh sufficiently at my sufficient supply of humor;
c. and to so applaud my sufficient but not excessive departures from dignity as to register appreciation without boisterousness.

I think that if we all adhere to these precepts, with which we have been so generously supplied, we can probably manage to keep this affair on the high level contemplated by the Senator from Pennsylvania.

I am not going to offer you any mondial truths or any discourse on jurisprudence, but only some rather earthy and undistinguished observations concerning the Institute and its work by an adviser and occasional reporter of the property restatement. These are to be two in number. The first is laudatory and requires no action. The second is laudatory or not, depending upon your point of view, and seeks to induce some action which, I believe, is important in its psychological as well as its practical aspects.

Worth-while thought No. 1 is this: That the Institute has offered the answer to the age old question "Quis custodiet ipsos custodes?" which may be freely translated as "Who will educate the educators?"

There is no question in my mind that if the Restatements were to be tossed jointly and severally into the Potomac tomorrow morning the Carnegie money would still have been well spent. One of the fundamental propositions upon which the Institute was founded was that there was nothing a school teacher would not do for $25 a day—and this has proved abso-

*Address delivered at Annual Dinner of the American Law Institute at Washington.

lutely sound. Lured by the siren song of five $5 bills per diem some 80 to 100 law professors have gathered together for an average of 20 days a year for serious interchange of ideas upon the substance of the specialties they profess. As you know the discussions take as a basis the concentrated responsible work of one of their number and an exhaustive search of the authorities. The result has been an amazing degree of self-education by the advisers,—a type of activity which strikes at the two major diseases that are likely to be endemic in any academic institution—lethargy and insularity. An immeasurable amount of good has been done and is being done. There can be no question that the standards of legal education have been importantly increased as a result of the participation by professors in the work of the Institute. Marked gains in the quality of the students we turn out cannot fail to result.

Another fine thing about the Institute from the professors' point of view is the travel with which it provides us. In the pre-Institute days we used to be the little shut-ins of the legal gentry. I don't recall any instances in which they brought the circus to us to give us contact with the great world outside; but I shouldn't have been surprised if this had happened. Cooped up in Cambridge, or any other university town, one gets the strangest notions. I was trying to recall, for instance, my impressions of Wisconsin before a Restatement meeting gave me my first view of that delightful commonwealth. My general idea was that it was a state with a lot of lakes peopled by young women in diaphanous gowns kneeling on rocks looking into limpid pools and exhorting the customers to stay on the alkaline side. Also the last refuge under the Stars and Stripes of the doctrine of primogeniture in politics—the state where senators have great shocks of brown hair that is much too rough and college presidents have very little black hair that is somewhat too smooth. Well, we had a conference of the Property Group in Madison in the first week in June about three years ago. We met on the terrace of the Wisconsin Union. Those of you who know Madison will realize what a mistake that was; but for those of you who don't I will explain. The Union is built right on the lake front and the terrace is on the lake side. As the meeting was at first organized we were sitting on both sides of a long refectory table, some nature lovers facing the lake, some more practical souls back to it because they didn't like the reflection of the water in their eyes. As the day progressed it was discovered that the beach and pier at the Union was the favored spot for students to swim. It may be recalled that the University of Wisconsin is rather violently co-educational. The consequence was that the conference ended up with the conferees lined up, glare or no glare, on the shore side of the table like da Vinci's Last Supper and that there was precious little work done at that conference. I shall have something more to say about the education of the educators along geographical lines at a later point in the program. For the moment suffice it to say that new vistas have been opened up for many of us. This is all to the good. I repeat, there is nothing to be done about this. Just continue the good work. And long may she wave.

My worth-while thought No. 2 is along a somewhat different line. It may perhaps be best expressed by the statement that the finest thing about the Restatement as it now stands is how different it is from what it started out to be.

In the first fresh flush of enthusiasm the accepted notion was that the Restatement would stand on its own authority. It would give no reasons; it would cite no authority; it would state no history; it would concede no doubt or divergence. There was to be no law but law, and the Institute was to be the prophet of law. The blackletter was to be law because we said so, and that was that. There were two precedents for this general attitude toward things and they had varying degrees of success. The first was in the Book of Genesis. Someone said, "Let there be light"; and this went off very well, or so it is reported. The second was the familiar case of King Canute—and in this instance command and dogmatic assertion were not so successful. If the Institute had persisted in merely saying "Let this be law," history would have repeated itself one way or the other—and, loving the Institute as I do, I am just as glad that we never found out which way. Of course, it was one thing in the Restatement of Contracts and quite another thing thereafter. Williston could say "This is law" and everyone outside the walls of the law building at New Haven would believe it. But it was not clearly foreseen in those early lush days that the supply of Willistons was distinctly limited—that sooner or later it would be necessary for the Institute to appoint X as Reporter for this and Y as Reporter for that, finally getting down to Leach as a Reporter for Property.

So, little by little, it became visible to the naked eye that something more than dogma was requisite.

(1) First came the Explanatory Notes—the first suggestion that what appeared in the blackletter was not carved in marble above the clouds of Mt. Sinai but was the resolution of some very human conflicts arising from very human sources. Of course these were to be read only by the chaste eyes of the members of the Institute; but sooner or later it was inevitable that someone would think they were pretty useful and argue that they should pass into the Restatement. This inevitability came to pass in what I shall later refer to as the Battle of the Explanatory Notes.

(2) Next came the Special and Statutory Notes —reminders that what the Institute said wasn't so in many places—indeed, with reference to one section of the Property Restatement, wasn't so anywhere except in South Carolina. These got into the printed volumes, not without struggle, but at least without bloodshed.

(3) By this time the camel was obviously getting substantial portions of his anatomy into the tent. So it was no great surprise when the Introductory Notes were approved. There was no particular limitation to the function of an Introductory Note except that it be introductory—and a liberal constructionist could crowd quite a bit into that word. So, as things turned out, these amorphous organisms proved to be great instruments of progress in the hands of so inflexible a pursuer of flexibility as Professor Powell.

(4) Then came the Rationale comments—where the Institute concluded that it was not infra dignitatem to give the reasoning upon which the rule of the blackletter was adopted. This was a great step; for it changed the Restatement from a dogmatic to a rational basis. The Institute undertook to pursuade rather than command, and thus made itself a part of the process that has always been the foundation of the common law and its greatest safeguard against per-

petuated error. This was the great change; though it was somewhat less dramatic than the next.

(5) This was the pronouncement that the historical comment was kosher. In the historical comment—mirabile dictu—it became permissible to cite cases, provided only that they were very, very old cases. The Year Books would slide through without a murmur; Coke's Reports were considered respectable; Vesey, Jr., was suspect; but decisions since 1850 were definitely taboo.

(6) Finally came the Battle of the Explanatory Notes. Nearly all of the Restatements had had Explanatory Notes, containing citations of conflicting authorities on doubtful points; but up to the Property Restatement there had been no serious attempt to issue these to the public in the published volume. Dick Powell, however, thought the Explanatory Notes should be included; the Director thought otherwise. After a long series of sit-down strikes by Powell and lock-outs by the Director, they finally got together in a room for a definitive negotiation and closed the door. The privacy of this conference is one of the great tragedies of all time; for it must have been something to observe. Joe Humphreys ought to have been there to start it off; "In this corner, William Draper Lewis, the mildest man that ever murdered an adjective or scuttled a noun, that world-famous genius at saying offensive things inoffensively. He is not to be confused with the Detroit Bomber; he comes from the Philadelphia branch of the Lewis family. In that corner, Richard R. B. Powell, that—what shall I say—that hesitant, deferential, retiring, obsequious, soft-spoken master of the art of understatement." Well, after a tense period they emerged from the room, looking rather like John L. Lewis and Walter P. Chrysler; and they had with them a formula. The formula was this:

Clause 1. No Explanatory Notes were to be published.

Clause 2. About 99 44/100% of what was in the Explanatory Notes was to be published under other forms. Most of it was bootlegged into the text directly in the shape of historical comments, with names of cases, citations of cases and quotations from Blackstone, complete with wheels. Some went into Special Notes, also with case references. And the rest went into what were known as Monographs at the end of each volume. These looked like Explanatory Notes, smelled like Explanatory Notes, acted like Explanatory Notes—but were not Explanatory Notes because they were Monographs. The way you could tell was that they appeared in the printed volume after the Index, rather than before it. They were in the Restatement but not of it.

Practically all this development has taken place within the last five years. Simultaneously with it there was progressing a work whose usefulness and importance cannot be over-estimated—and by this I refer to the State annotations. State decisions were being collected and correlated to the Restatement, so that lawyers, taking the Restatement as a starting point, could find the local cases the necessity for which no Restatement lacking legislative force could obviate. So now we have in increasing quantity, linked directly to the Restatement, the case authority which the Restatement shunned for 10 years and now lets into the official volume only grudgingly through a few side doors.

So the Institute has traveled a long road since 1923. And it is right that it should. The early hope that dogmatic assertion by the Institute might replace history, authority and reason as the basis upon which American law is built has never been realized. As things developed it became clear that what was originally referred to corporatively as the statements of the Institute were really statements by groups of schoolteachers; for by necessity the basic work of the Institute has to be done by the Reporters and the Advisory groups. And while school teachers are a good deal better in the field of restatement than they are in the field of politics, I as one of them do not deplore the fact that the American Bar seems not to be ready to substitute decisions by professors arrived at in abstracto in the retirement of the conference room for decisions by judges arrived at ad hoc in the presence of the contending vital forces of the court room. We have our appropriate and very useful functions; but they are in aid of the traditional processes of the common-law, not in substitution for them. Privileged as we are to devote large portions of our time to the study of a single field of the law, we are in a position to suggest the applicability and, what is often more important, the limitations of history, to indicate the impact of analogies and to point out the distinction between reason and fallacy from the longer perspective of a view of the subject matter as a whole. Auxiliary functions these, not substitutional functions,—functions in which you, as the body of the Institute, participate by checking our natural tendencies to become hyper-academic and by giving the weight of your authority to the conclusions which we reach and you approve.

From the austerity of the Contracts Restatement to the varied forms and expanded substance of the current Restatements has been an evolutional process. Introductory Notes, Special Notes, Statutory Notes, Rationale Comments, Historical Comments and Monographs—all these have crept into the picture without much fanfare of trumpets. The rule of the Contracts Restatement has been whittled away here, distinguished there, but never reversed. Of course, this is all in ancient tradition of lawyers; but we are not forced to be thus traditional. If the Supreme Court of the United States can frankly over-rule the Adkins Case we can frankly over-rule the Williston Case. I may say that no one is more in favor of such a reversal than Mr. Williston himself.

A fair question presents itself: Would such an express reversal of Institute policy be a futile gesture in view of the fact that the policy has already been in effect reversed by devious and indirect means? My answer is, No. For if it were once frankly recognized that the Institute now is offering a Restatement which is visibly supported by history, reason and authority, certain action would be obviously indicated.

In the first place some residual corrolaries of the older notion would be abolished.

One of these is the extremely irritating by-law that we can never adversely criticize a rule which we find we have to state. Such a by-law presents a very unpleasant dilemma to a Reporter. He must either state a good rule which he knows perfectly well is not the law; or he must state a bad rule and by his very statement entrench it further.

The choice between these disagreeable alternatives is made now one way, now the other. For example, in §160 of the Property Restatement the Institute has taken the position that when a person attempts to transfer a right of entry for condition broken (of course, those of you who are loyal members of the In-

stitute won't know what that is until I tell you that it's the same thing as a power of termination) the right of entry is destroyed,—a senseless rule for which there never was a justification. And this is put forth in the same language and with the same apparent approbation as the rule that a contract must have consideration or a seal. There she stands, sanctified for all time as far as the Institute has the power of sanctification. On the other hand there is §240 which states as the common-law that a legal contingent remainder in land is valid though it fails to vest before the termination of the preceding estate—a statement which ranks with the declaration in the New Republic by the eminent dean of Northwestern Law School that the sit-down strike is legal. A hope of his, perhaps, as the contingent remainder rule is a hope of ours; but sheerest bunkum as a judgment. The vice of such statements by Dean Green in the New Republic and by ourselves in the Restatement is that some trusting soul may believe it, rely on it and find himself on the wrong end of a criminal prosecution in the one case or an action of ejectment in the other. I don't feel qualified to tell Dean Green what he could have done instead. But I can tell the Institute: state the rule as we know it to be; state that it's a bad rule; state that courts which have adopted it have overlooked its inapplicability to American institutions; and point out the grounds upon which a court would be justified in ignoring it. When the essence of the Restatement was dogma, it was plainly a contradiction in terms to declare that our dogma was bad dogma. But with the passing of the dogmatic basis, we can freely admit that law is not perfect just because it is still law.

Perhaps another way of expressing this same idea is to say that the abolition of this corrolary by-law will allow the Restatement to depict the law as dynamic rather than static. To state on a dogmatic basis rules of law which are in a state of flux is just as realistic, and no more realistic, than a still photograph of a horse race. The picture may show the horse with all four feet in the air and his nose just a foot short of the wire; but when you see this picture in the Sunday sports section you have a pretty good hunch that the horse isn't still in the same position. So with the Restatement. It began by showing the law as completely static—"stopped" as the news photographers say. Then the historical comments were introduced, showing the evolutionary processes of the past out of which the present rule arose. It is too obvious for argument that the companion to the historical comment, and perhaps the most useful thing the Institute can produce, is the critical comment indicating the probable and desirable evolutionary processes of the future.

It is true that the statutes amending the common law which the Institute is preparing in cooperation with the Commissioners on Uniform State Laws are designed to meet this difficulty. But they can succeed only in part and in a rather small part. Most of the situations in which it is desirable that the Institute should express its disapproval of existing rules are those in which the rule is either a small one, not important enough to justify legislation, or in which the rule is less a rule than a constructional tendency, not appropriate to remedy by legislation. To rely on such statutory projects alone is to ignore the great potentialities for flexibility and progress which exist within the framework of the common law. It will be an evil thing if the Restatement tends to retard those processes. It will be a splendid thing if the Restatement accelerates them along desirable lines.

You will observe that the by-law whose repeal I have just been advocating, and which would necessarily be repealed if there were a frank avowal that the credo of the Institute has been amended, is a by-law which applies where authorities compel us to state as law a rule we think to be bad. There is another equally obstructive by-law which applies to the reverse situation—that is, where we are stating a rule which we believe to be sound but which is opposed by a substantial body of authority. The current official position is that we cannot recognize the existence of the opposing view and therefore, of course, cannot discuss means by which its application can be minimized so that the preferred result will be reached in most cases. Here is another corrolary to the old dogma of Institute infallibility that we should joyously push off the Tarpean Rock.

Let me point out how the present by-law works. We have declared in the Property Restatement that legal contingent reminders in land are indestrucible. Without treading on any controversial ground concerning this matter I can say that there are several things upon which everyone is agreed:

1. That the rule as we have stated it is the preferable rule as a matter of principle;
2. That the opposite rule exists in many states;
3. That where the opposite rule exists there are six or eight ways in which the operation of the rule can be so minimized that there is precious little left of it when competent counsel, aware of these devices of minimization, are on the job.

Certainly one of the most useful things we could have done was to point out what these devices were and thus reduce to a minimum the cases where the opposite rule actually produced an opposite result. Mr. Powell had done this very expertly in an Explanatory Note; but this material was one of the casualties in the Battle of the Explanatory Notes. So the reader of the Restatement in whose state it is settled that the opposite rule applies, finds a statement that is completely untrue in his jurisdiction and obtains no help in solving the problem which his local law presents. Of course the reductio ad absurdum of this Institute by-law comes when we deal with some subject where all states have taken a position and where there are two or three views about equally well supported—as in the case of the division of dividends between life tenant and remainderman in the Trusts Restatement. We select one of the positions, elaborate it fully; but give no indication as to what the other positions are or how they are applied.

We do this, too, in the face of the long-established practice that if the opposing rule is only statutory we can state what it is in Comment and cite the statute with some discussion of cases construing it in a Statutory Note or a Special Note. Why judge-made law should be thus discriminated against is beyond my powers of comprehension.

Naturally the aspects of a frank avowal of a change in Institute policy which loom large to me are those which are of particular importance to a reporter and adviser. Beyond this I do not presume to speculate in detail. I suppose that, for one thing, restatements already published would be implemented with the rational, historical and authoritative materials which have been approved in later Restatements—and I understand from the Director that this is contemplated at such

time as reprinting becomes necessary. I suppose also that there would arise in a new form the question whether the extensive and unique memoranda of law prepared by the Reporters should be published by the Institute or whether the Institute should collect all state annotations into a single volume for the use of the profession.

To me the essential aspect of the present situation is that we are well on the road to recovery from a pretty serious institutional Jehovah complex; and the important thing for us to do is to admit it, nay proclaim it, to ourselves and to the world. Nothing but good can come from such frankness with ourselves and with those whom we serve.

HERE IT IS AGAIN!—EFFORT TO ABRIDGE POWER OF FEDERAL JUDGES IN JURY TRIALS

House of Representatives on June 21 Passed, without Debate or Record Vote, H. R. 4721, Which Is a New and Variant Form of the Recurring Proposal to Take Away or Limit the Powers of Federal Judges in the Conduct of Jury Trials and the Administration of Justice—Classic Statement of American Bar Association's Position—Action Taken Six Times against Similar Proposals—State and Local Bar Associations and Individual Lawyers and Citizens Should Promptly Acquaint Members of Senate and the Senate Judiciary Committee with Their Views.

DURING its "consent calendar" on June 21st, the House of Representatives took up in the absence of objection, and passed without debate or record vote, the bill (H. R. 4721) introduced by Congressman Robert L. Ramsay of West Virginia and reported favorably on June 15th, in a form completely amended as to contents and title, by the Judiciary Committee. The substitute measure reported by the Committee had been placed before the House only a few moments before it was passed, and it seems improbable that the significance and effects of such an enactment were understood by many members of the House. As passed by the House, the measure is entitled "A bill relative to granting and giving instructions in civil and criminal cases in the district courts of continental United States," and provides as follows:

"That upon the trial of any case, civil or criminal, before a jury, in any district court of continental United States, or in any other Federal court of the continental United States, authorized to try cases with the aid of a jury, the form, manner, and time of giving and granting instructions to the jury shall be governed by the law and practice in the State courts of the State in which such trial may be had, and the judge shall make no comment upon the weight, sufficiency, or credibility of the evidence or any part thereof, or upon the character, appearance, demeanor, or credibility of any witness or party, except as comment is authorized in trials of such cases by the law and practice in the State courts of the State where such trial is had."

On June 22nd, the House bill was referred by the Senate to its Commitee on the Judiciary. It is stated that a sub-committee will be appointed to hold hearings upon the measure, if Bar organizations and interested citizens sufficiently request an opportunity to be heard.

The pending measure will be recognized as a new and variant form of a recurring proposal to take away or limit the powers and prerogatives of judges of the Courts of the United States, in the conduct of jury trials and the administration of justice. Legislation along this line has repeatedly been disapproved by the American Bar Association, through votes taken upon Committee recommendations at annual meetings. Usually the action of the Association has been taken by unanimous vote of the members present. The Association has been active in opposing all such measures, whenever they appeared to have any prospect of enactment.

The classic statement of the Association's position as to such proposals was drafted by great jurists and distinguished lawyers in 1918, and was adopted by the annual meeting in that year (1918 Annual Report Volume, page 93). Its trenchant condemnation of the bill then reported by the Judiciary Committee of the House of Representatives has full force today:

"The American Bar Association enters its most solemn protest against the bill H. R. No. 9354 reported by the Judiciary Committee of the House of Representatives which takes from the judges of the Federal Courts the right to charge the jury upon facts and limits their power to deal with juries in this way.

"Such a statute in many cases would make jury trial a mockery and in fact destroys the jury trial as the term is used in the American constitutions. The Supreme Court has said that a jury trial 'is a trial by a jury of 12 men in the presence and under the superintendence of a judge empowered to instruct them on the law and to advise them on the facts,' and under this statute the jury trial would cease to exist. If it is the object of Courts to do justice, it is clear that a statute which deprives the only impartial lawyer connected with the trial of the right to help the jury by instructing them on the various questions which arise before them will not promote justice, but will in many cases defeat it, since it leaves the jury to be swayed by

appeals to prejudice, by the eloquence of counsel, by misrepresentation of every sort without that correction which only an experienced and impartial magistrate can supply. If passed it would degrade the Bench, increase materially the chances of injustice, and enormously enhance the danger that the jury may be swayed by passion and prejudice, with the result that the jury system itself will become discredited and eventually destroyed, thus taking from the citizen the protection which it now affords against the abuse of power."

Action by the Association in opposition to the Caraway bill and other bills to impair the powers of Federal judges in the conduct of jury trials was taken as follows:

Annual Report Volume—Year	Pages
1925	103, 106, 406
1926	108, 420, 421
1927	86, 292
1928	102, 103, 419
1929	93, 373
1930	69, 455

The proposal has not, in subsequent years, reached the legislative stage where the Association needed to take further action, beyond reaffirming its opposition to measures designed to abridge or limit the powers and functions of the Federal Courts. Unless and until different action is taken by the Association, at an annual meeting or through referendum vote of its membership, the attitude of the Association is in opposition to the attempted limitation, by legislative enactment, of the historic judicial function of Federal judges in the trial of jury cases.

In behalf of his proposal as limited by the Judiciary Committee of the House, Mr. Ramsay's report for that Committee stated that in seven States there is a provision in the Constitution forbidding judges to comment on the evidence: Arkansas, Arizona, Delaware, Nevada, South Carolina, Tennessee, and Washington. Sixteen States are said to have statutes to the same effect: Alabama, Florida, Georgia, Illinois, Iowa, Louisiana, Maine, Massachusetts, Michigan, Mississippi, North Carolina, North Dakota, New Mexico, Oregon, South Dakota, and Texas. The report says that in fourteen other states the same result has been reached by way of judicial decisions: Colorado, Indiana, Kansas, Kentucky, Ohio, Oklahoma, Maryland, Montana, Missouri, Nebraska, Virginia, West Virginia, Wyoming and Wisconsin, making a total of thirty-seven States that do not permit their judges in the State Courts to comment in instructions on the weight of evidence to the jury. Enactment of the bill would therefore take away the powers exercised by Federal judges in the trial of jury cases within at least thirty-seven States.

To many members of the Bar it will be apparent that the enactment of such a measure would be particularly inappropriate and unfortunate at this time, in view of the pendency of proposed Rules to govern practice and procedure in the Federal Courts. As to this aspect, Mr. Ramsay's report says, however:

"A reading of the resolution of Congress submitting to the Supreme Court the right to formulate a code of rules of practice and procedure in Federal trial Courts does not include the giving or granting of instructions to juries, as the Supreme Court in the *Nudd case* has decided 'that the granting of instructions is the personal conduct and administration of the judge in the discharge of his duties.'"

Despite its new and ostensibly limited form, the pending bill must be regarded as highly inimical to the fair and competent administration of justice. In criminal cases as well as in all other jury trials, the measure would seriously handicap the powers of the trial judge to assure a fair trial and see to it that the rights of persons belonging to unpopular minorities are determined according to due process of law. Present passage of the bill would reflect a disposition to impair the independence and lessen the prestige of the Federal Courts. We do not believe that such a purpose actuates a majority of the members of either the Senate or the House.

In any event, the State and local Bar Associations, as well as the lawyers and other citizens individually, ought to act promptly in acquainting members of the Senate with their views as to the Ramsay bill (H. R. 4721). Particularly should the members of the Judiciary Committee of the Senate be informed, by telegrams and letters, as to the views of the Bar and the public, for or against the enactment of a bill of such far-reaching consequences at this time. The members of the Judiciary Committee of the Senate are:

HENRY F. ASHURST, Arizona, *Chairman*
WILLIAM H. KING, Utah
M. M. NEELY, West Virginia
FREDERICK VAN NUYS, Indiana
PATRICK MCCARRAN, Nevada
M. M. LOGAN, Kentucky
WILLIAM H. DIETERICH, Illinois
GEORGE MCGILL, Kansas
JAMES H. HUGHES, Delaware
FREDERICK STEIWER, Oregon
CARL A. HATCH, New Mexico
EDWARD R. BURKE, Nebraska
KEY PITTMAN, Nevada
TOM CONNALLY, Texas
JOSEPH C. O'MAHONEY, Wyoming
WILLIAM E. BORAH, Idaho
GEORGE W. NORRIS, Nebraska
WARREN R. AUSTIN, Vermont

The constitutionality of a legislative impairment of the judicial function may be doubted, and would arise for adjudication if the measure became law. That a bill of this sweeping character went through the House of Representatives on a "consent calendar" and in the absence of objection, debate or record vote, shows the need for a constant vigilance, on the part of all friends of the Courts, that cannot be relaxed in hot weather or vacation periods, unless great harm is to be done to the Federal judicial system.

SENATE JUDICIARY COMMITTEE TESTIMONY

A digest of the testimony at the hearings before the Judiciary Committee of the United States Senate on the proposal to reorganize the Federal Judiciary has been printed in booklet form under the auspices of the Special Committee on the Supreme Court Proposal of the American Bar Association in cooperation with its Junior Bar Conference. The purpose of the booklet is to reduce to usable form the great mass of testimony given by witnesses both for and against the Proposal.

Single copies of the booklet will be furnished free to members of the Association including individual members of the Junior Bar Conference. Copies may be obtained by others at 10c a copy or $8.00 a hundred from the American Bar Association, 1140 North Dearborn Street, Chicago, Illinois.

THE WAGNER LABOR ACT—A NEW DEAL IN LABOR RELATIONS

Difficult Questions Which Have Arisen In Application of the Act or Will Arise in Future—The Major Question Is, What Employers Are Subject to the Statute?—Analysis of Five Decisions of the United States Supreme Court as Bearing upon This Point—Provisions of Act Which Are Either Ambiguous or Difficult of Application—Problems of Employee Representation—Appropriate Unit for Collective Bargaining under Provisions of Measure—Suggestions for Improving Act as It Now Stands—It Reasonably Safeguards Principle of Collective Bargaining but Its One-Sided Features Should Be Removed, etc.*

By William A. McAfee
Member of Cleveland, O., Bar

THERE are many difficult questions involving the application of the act, which have already arisen and will in the future arise. The first of these questions is the major one as to what employers are subject to the Act. The answer to this involves an analysis of the decisions of the United States Supreme Court recently handed down in five cases in which the validity of the Act was sustained.

First it may be said definitely that all employers engaged solely in interstate commerce or transportation are subject to the provisions of the Act. This is well settled by the decision in the case of *Washington, Virginia and Maryland Coach Company vs. National Labor Relations Board*, decided April 12, 1937, by the Supreme Court of the United States. If an employer is engaged in both interstate and intrastate commerce, he is not only subject to the Act with respect to his labor relations with employees actually engaged in the interstate portion of such business, but also with respect to his labor relations with employees engaged in intrastate portion of his operations, if an interruption in such operations would directly affect his interstate business. See *Virginia Railway Company vs. System Federation No.* 40, decided March 29, 1937, where the labor relations of a railroad with its car shop employees were held subject to regulation under the Railway Labor Act, even though the employees were not directly engaged in interstate commerce or transportation, since the effect of an interruption in the activities of these employees would cripple the interstate business of the employer.

On the other hand, it is equally clear that if an employer is engaged in purely local activities, and neither buys nor sells in any substantial quantities in interstate commerce, he is not subject to the provisions of the Wagner Labor Act. Between these two extremes lies a field where the application of the law is doubtful. Most employers make some purchases or some sales in interstate commerce. Whether or not such an employer is subject to the Act will depend on the facts of his situation. Until the whole matter has been further clarified by decisions, it is extremely hazardous to make a guess as to the general lines along which the law will be finally settled. However, an analysis of the Supreme Court decisions in the three cases involving the application of the law to the labor relations of an employer with its employees engaged in local manufacturing operations may be helpful. These three cases are *National Labor Relations Board vs. Jones and Laughlin Steel Corporation, National Labor Relations Board vs. Fruehauf Trailer Company, and National Labor Relations Board vs. Friedman-Harry-Marks Clothing Company, Inc.*, all decided April 12, 1937.

All of these companies were engaged in manufacturing operations, and bought or received more than fifty per cent of their materials from, and sold more than fifty per cent of their products outside of the state where they conducted their manufacturing operations. Nevertheless, the court held that in all three cases, the provisions of the Wagner Labor Act, prohibiting discrimination in employment by reason of union membership, were applicable. It upheld the decision of the Labor Board, ordering employees discharged for this reason reinstated, even though the employees were engaged solely in intrastate manufacturing operations of the companies.

The reasoning of the court may be briefly summarized as follows:

(a) The direct effect of labor troubles in the manufacturing plant of an employer whose business is predominantly interstate is to interrupt, obstruct and prevent the free flow of goods in interstate commerce.

(b) The power of Congress to regulate interstate commerce includes the power to enact legislation designed to protect or prevent interruption of interstate commerce.

(c) This is true even though the subject matter of the legislation is an intrastate activity, and even though it is manufacturing and not commerce, provided the activity regulated directly affects interstate commerce.

(d) The provisions of the Wagner Labor Act designed to protect employees' rights of self-organiza-

*Address delivered before the Cleveland Bar Association. The first portion of the address as delivered, with its historical material and summary of the main provisions of the Act, covers about the same ground as the article by Mr. Henry P. Chandler of Chicago, printed in the April 1936 issue of the Journal, and for that reason has been omitted with Mr. McAfee's consent.

tion and to collective bargaining will encourage the peaceful settlement of labor disputes, and therefore prevent interruption in or obstructions to interstate commerce by reason of strikes.

(e) Therefore, as applied to labor relations in manufacturing operations of concerns whose business is predominantly interstate in character, the Wagner Labor Act is valid and constitutional under the power to regulate interstate commerce.

The significant part of the decision is the holding of the cases, first, that under the circumstances set forth in the cases, Congress may regulate labor relations in an activity such as manufacturing, which is not commerce at all, and also which is purely intrastate activity. This principle, although it seems new and startling, was clearly foreshadowed by the *Shreveport* rate case, 234 U. S. 342, where it was held that intrastate commerce might be regulated if necessary to protect interstate commerce and the *Coronado Coal* case, 268 U. S. 295, where the Sherman Anti-trust Law was held valid as applied to interference with a manufacturing operation by way of a strike and destruction of mine property, where the effect of the interference was to obstruct or injure interstate commerce and the intent required by the statute was shown.

It appears that where Congress attempts to regulate intrastate commerce, or an operation not involving commerce at all, such as manufacturing, the direct effect of the legislation must be to protect or to prevent injury to or obstruction of interstate commerce. The operation of the Wagner Act is so limited by its very terms. (See definition of the phrase "affecting commerce," Section 2, Paragraph (9))

In *Schechter Corporation vs. United States,* 295 U. S. 495, the NRA was held to be unconstitutional, since the effect of the transactions and relations which the NRA sought to regulate was so indirect and remote upon interstate commerce in the business in which the defendants were engaged that they could not constitutionally be regulated by Congress. It would seem clear under the *Schechter* case that the labor relations of local merchants who sell their goods only in one state are not subject to regulation under the Wagner Act, even though their stocks of goods may be purchased in interstate commerce. The same thing may be said of local manufacturing operations, where a predominant part of the products manufactured are sold within a state in which they are manufactured, even though the raw materials are purchased from outside the state.

If, on the other hand, the volume of sales of a merchant or a local manufacturer is so large, although intrastate in character, that a strike of its employees would cause a substantial diminution in interstate commerce in the type of goods or materials purchased by such merchant or manufacturer—query: whether the Wagner Labor Act would be held to be valid as applied to such a type of employer. Does the fact that an employer, engaged in mining or manufacturing and selling fifty per cent or more of his products in interstate commerce, buys none of his raw materials from outside of the State exempt him from the provisions of the Wagner Act? The answer would seem to be "No," especially if the character of his products is such that the industry to which he belongs may be said to be a national industry. In saying this the writer is not unmindful of the language in the case of *Carter vs. Carter Coal Co.,* 298 U. S. 238, which apparently holds to the contrary and which has not been expressly overruled. The business of such an employer is predominantly interstate in character if he sells fifty per cent or more of his products outside of the State, no matter where he buys his materials. It just happens that in the three cases decided by the Supreme Court, the defendant manufacturing concerns not only bought fifty per cent of their raw materials, but sold more than fifty per cent of their products outside of the State. The Supreme Court, in the Wagner Act cases, laid hold of these facts as demonstrating that their business was predominantly interstate in character, and therefore subject to regulation. It by no means follows, however, that the absence of either factor would have taken the companies out of the operation of the Act, since the Supreme Court did not rest its decision in the cases on the so-called "stream of commerce" principle laid down in *Swift & Co. vs. United States,* 196 U. S. 375. There will be much litigation before it is finally determined what employers are subject to the Wagner Act. There will be many borderline cases, and the Supreme Court has indicated that each case must be decided upon its facts. The decision of any case will depend on the degree and nature of the interstate activities of the employer, so that a hard and fast line is extremely difficult to draw.

The States are now passing acts containing provisions similar to the Wagner Act. If an employer is subject to the Wagner Act, he is not subject to the operation of a State labor act. It will therefore be difficult in some cases for an employer to determine whether he is subject to the State or Federal labor law.

Aside from the difficulty in determining whether or not an employer is subject at all to the provisions of the Wagner Act, some of the provisions of the Act are themselves ambiguous and difficult of application. A discussion of some of the questions which may arise follows.

It is expressly provided in Section (3) that nothing in the Act shall prevent a closed shop agreement with a labor organization, if such labor organization is the representative of the employees. Under the Act, therefore, if a bona fide labor organization was duly designated by a majority of the employees, a closed shop agreement could be entered into with it lawfully, if the employer so chose. Would such an agreement be recognized as valid if made for a period of five years? Nothing in the Act is helpful on this point. The Labor Board, however, has indicated that it will recognize no collective bargaining agreements to be valid or existing for more than one year, and that at the expiration of that period it will order a new election, if requested, to determine the representatives of the employees for collective bargaining purposes. If so, what becomes of the agreement? It was valid when entered into if the labor organization with whom the employer contracted was the representative of a majority of the employees for collective bargaining purposes. What has rendered it invalid? It seems, on the other hand, only sensible that in view of changing conditions, collective bargaining agreements should not be permitted to bind employees under the majority rule principle for too long a period. If this question is presented to the courts, they will probably hold that, in the absence of express authorization by the members of an agreement for a longer period, it is not within the scope of the authority of the officials of a labor organization to make a collective bargaining agreement covering a period longer than one year.

Section 8 (5) of the Act makes it an unfair labor practice for an employer to refuse to bargain col-

lectively with the representatives of his employees, subject to the provisions of Section 9 (a). Section 9 (a) provides that representatives selected for the purposes of collective bargaining by a majority of the employees in a unit appropriate for such purposes shall be the representatives of all the employees in the unit, for collective bargaining purposes. Suppose that only a minority of the employees of an employer are members of a union and the union presents collective bargaining demands to the employer. The other employees of the employer are wholly unorganized. Must the employer bargain collectively with the minority group under Section 8 (5) above quoted, or does the phrase in this section making it subject to the provisions of Section 9 (a) relieve him of any obligations to bargain collectively with the minority group, even though no majority representatives have been selected? The meaning of Section 8 (5) is far from clear. However, the National Labor Relations Board held, in the matter of *Segall-Maigen, Inc., and International Ladies' Garment Workers Union Local No.* 50, decided May 14, 1936, Case No. C-35, in an identical situation, that an employer was not guilty of a violation of Section 8 (5) by refusing to bargain collectively with a union representing a minority of his employees, even though the majority was unorganized and had designated no representatives. The decision of the Labor Board was a sensible and practical one. If it had held that the employer was obligated to bargain collectively with this particular organized minority, it would have been compelled in other cases, to be consistent, to hold that the employer was obligated to deal collectively with all organized minority groups in the absence of a designation by the majority. The subject matter of collective bargaining is such that a collective bargaining agreement cannot, as a practical matter, be negotiated with several minority groups separately; and the combining of representatives of various minority groups into one bargaining committee, which was tried in the automobile industry, has not been found to be feasible, in view of the hostility of the various labor groups toward each other. Moreover, no mechanics for such a set-up are provided in the Act.

Is the company union or company representation plan outlawed by the Act? It is clear that if, by the term "company union" is meant a labor organization confined to the limits of one employer, such a union or representation plan may be the representative of all of the employees, provided it is so designated and selected by a majority of same in the unit appropriate for such purpose, and provided it is not dominated, controlled or contributed to by the employer. If it is so dominated, controlled or contributed to by the employer, it will not be recognized as the representative of the employees for collective bargaining purposes, and the decisions of the Board have indicated that they will go even to the extent of ordering the dis-establishment of such a union, and the dissolution thereof. If a company union was formed at the instigation of the employer, but if he has discontinued all dominance over or contributions to the company union, may it be the representative of the employees for collective bargaining purposes, although illegal in its inception? The writer sees no reason why it cannot represent the employees, if it is reorganized so as to purge it of its illegality. The particular individuals elected as officers of the company union or its bargaining agents during any period when the employer was exercising domination or control, or contributed to it, would probably not be considered to be the bona fide representatives of the employees in the company union. In such cases, either a new election of officers or other bargaining agents should be held after the company had severed all relations with the company union, and had ceased to exercise any control or make any contributions to it, or the members of the company union should by some other method make a new designation of the persons who are to act as their bargaining agents. If such a company union had a provision in its constitution requiring consent of the employer to any changes, this provision should be repealed. If, as frequently happens, the constitution of the company union makes no provision for meetings of the members of the union, but merely provides for meetings of their representatives, a provision providing for meetings of the members and reports to them by their bargaining representatives should be inserted. If all this is done, the writer sees no reason why such a company union, although illegal in its inception, should not be held to be a valid representative of the employees for collective bargaining purposes, if so designated by a majority of the employees, after the termination of employer-domination and contribution, and proper amendment of its constitution. Under the peculiar wording of Section 8, Paragraph (3), such reorganized company union might not be able to enter into a closed shop agreement with the employer, although an entirely new company union might do so.

Another question giving some difficulty arises under the Act. Under what circumstances can it be said that representatives are designated or selected for the purposes of collective bargaining by a majority of the employees in the unit appropriate for such purpose, so that they are the exclusive representatives of all of the employees in the unit for collective bargaining purposes, under Section 9 (a)? Does this mean:

(1) That the representatives must be selected by the affirmative vote of a majority of all of the employees in the unit who are eligible to vote in the election; or

(2) That they may be selected by the vote of a majority of the employees in the unit who actually vote in the election, provided a majority participate; or

(3) That they may be selected by the vote of the majority of the employees actually voting in the election, whether or not a majority of all of the employees participate?

The answer to this question is, to say the least, doubtful. Under the Railway Labor Act, which contains the following provision—

"The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purpose of this Act,"

the Railway Labor Board has held in several cases that where a majority of a craft participated in the election, the majority of the votes cast were sufficient to designate a representative, even though the votes cast in favor of the representatives were less than a majority of those eligible to vote in the election. Justice Stone specifically approved these rulings under the Railway Labor Act in *Virginia Railway Company vs. System Federation No.* 40, decided by the Supreme Court on March 29, 1937. His reasoning in his opinion is as follows:

"It is to be noted that the words of the section confer the right of determination upon a majority of those eligible to vote, but are silent as to the manner in which the right shall be exercised. Election laws providing for approval of a proposal by a specified majority of an electorate have been generally construed as requiring only the consent of

the specified majority of those participating in the election. . . Those who do not participate are presumed to assent to the expressed will of the majority of those voting."

Justice Stone's reasoning would seem to go so far as to lead to the result that even if a mere minority participated in the election, a majority of the minority should have the right to determine the representation of the entire unit. It should be noted, however, that the wording of the Wagner Labor Act provision is somewhat different from that of the Railway Labor Act, in that it provides that representatives *"designated or selected"* by the majority of the employees in a unit shall be entitled to exclusive representation of all employees in the unit. It would seem that the use of the words "designated or selected" implies some sort of affirmative action on the part of the employees in the unit, and that mere absence from the polls would not be considered a designation or selection of the representatives selected by the majority of those voting. If so, Justice Stone's reasoning does not apply to the Wagner Labor Act, and it should be interpreted as requiring the vote of a majority of all *eligible* employees in the unit in order to select exclusive representatives. If the Act is to be satisfactorily administered, it would seem that this should be the rule. Otherwise, a militant minority could gain exclusive representation through an election by intimidating or coercing other employees into remaining away from the polls. The present Labor Board has used language in its decisions from time to time indicating that a majority of those eligible to vote is necessary for the selection of representatives. *In the matter of Atlantic Refining Company,* N.L.R.B. Case No. C-54, and Case No. R-18, decided March 20, 1936. See also *Oakland Mills* election case.

The statute makes it an unfair labor practice for the employer to refuse to bargain collectively with the representatives of his employees. What must an employer do to comply with his obligation to bargain collectively? This is a somewhat difficult question to answer. It is clear, of course, that he cannot refuse to meet with the representatives of his employees, or at the meeting with them, to discuss the propositions which they present to him. Does his obligation go any further? If a common ground of understanding is reached, as to the demands, it is clear that they must be embodied in an agreement, and it would seem that such an agreement should bind both parties for a certain period of time, which, however, need not be long, or which may be terminated on short notice. The agreement need not be reduced to writing, but may be a mere oral one. Must the employer make counter-proposals to the proposals of the union, or may he stand pat on his position that no change can be made? It is probably true that he can do so. However, he should not arbitrarily refuse demands, but should assign reasons for the refusal, and if necessary, produce facts and figures to justify the same.

In defending the Wagner Bill in the Senate, the Chairman of the Senate Committee having the bill in charge used the following language:

"Let me emphasize again: When the employees have chosen their organization, when they have selected their representatives, all the Board proposes to do is to escort them to the door of the employer and say: 'Here they are —the legal representatives of your employees.' What happens behind those doors is not inquired into, and the bill does not seek to inquire into it. It anticipates that the employer will deal reasonably with the employees, that he will be patient, but he is obliged to sign no agreement; he san say: 'Gentlemen, we have heard you and considered your proposals. We cannot comply with your request'; and that ends it."

Can an employer enter into a closed shop agreement with a minority union? As heretofore stated, he can do so when the union represents a majority of his employees in the appropriate collective bargaining unit. It seems clear that he cannot make such a closed shop agreement with a minority of his employees in an appropriate bargaining unit, for to do so would be a violation of Section 8 (3) of the Act, which forbids an employer to encourage or discourage membership in any labor organization by any discrimination in regard to hire or tenure of employment or any term or condition of employment, subject only to the proviso that a closed shop agreement may be made with the representatives of a majority of the employees.

May individual contracts with employees continue to be made after a collective bargaining agreement has been reached with the representatives of the majority? The Supreme Court, in upholding the validity of the Wagner Act, specifically said that nothing in the Act prevented the making of individual contracts with employees. Naturally, however, discrimination against union membership could not be effected under this guise and an employer would have to be careful not to offer individual contracts to employees on any basis which would afford grounds for a charge of discrimination against union members. If employers realize that they are subject to this limitation in the making of individual contracts, I am sure that there will not be many made.

What is an appropriate unit for collective bargaining purposes, within the meaning of the Act? This is an extremely important question which the Board has to determine in every case before certifying representatives or holding an election to determine the same. Section 9 (a) of the Act provides that the representatives of a majority of the employees in a unit appropriate for such purposes shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining. So the determination of the appropriate unit is a necessary prerequisite to determining the question of representation for collective bargaining. Section 9 (b) of the Act provides that the Board shall decide in each case whether the appropriate unit for the purposes of collective bargaining shall be "the employer unit, craft unit, plant unit, or subdivision thereof." The adjective "appropriate" is used in the law. Appropriate for what purpose? Apparently, from the wording of Section 9 (b), the unit selected must be a unit appropriate for the purposes of securing to the employees the full benefit of their right of self-organization and to collective bargaining. There must, however, be some limits to the scope of the unit. Can the unit ever be larger than the employer unit? Take for example a case like the automobile industry, which is being organized by one industrial union, and suppose that one large automobile plant is completely unorganized, while the balance of the industry, having more than a majority of the total employees in the industry, is one hundred per cent organized. Suppose, under such circumstances, the Board should decide that the appropriate unit for collective bargaining is the employees of the industry, and orders an election on this basis, at which the organized employees all vote for the industrial union as their representative, and the employees of the unorganized manufacturer vote for other representatives. The Board then certifies the industrial union as the

representative for collective bargaining purposes of all employees in the automobile industry. Demands are then served on the unorganized manufacturer for collective bargaining negotiations. May he refuse to enter into negotiations, on the ground that none of his employees desire to be represented by the industrial union, and that the unit chosen by the Board was not appropriate, within the meaning of the law? The situation presented by this case is certainly stretching majority rule to the limit. It would seem that the employer should not be required to negotiate with such a union, either on the ground that the Wagner Act, when properly construed, does not permit the exceeding of the employer unit, or on the ground that to do so under the circumstances presented by the above case would be a denial of due process of law, under the Fifth Amendment.

The tendencies of the various labor boards dealing with this subject have been to define appropriateness in terms of the natural groupings of the workmen themselves, taking into consideration such factors as training required, skill required, a disposition to band together, as evidenced by previous organization, and other matters of similar nature. Of course, craft organizations are by hypothesis organizations of the above mentioned character, and the various crafts will be found to constitute separate units within the limits of one employer, if the Board does not depart from its present position, and if the crafts desire to be represented separately. Where there has been no craft unit, organized separately from the rest of the employees, in a plant, and comparatively few members of any recognized craft, the Board has fixed the unit as including all of the employees on the payrolls, except clerical and supervisory staff. The Board is on a distinctly hot spot in the struggle between the industrial form of labor organization and the craft union form. If it gives separate representation to a certain craft in a plant, the balance of whose employees are organized in an industrial union, by determining that such craft constitutes a separate unit, it thereby tends to perpetuate the existence of the craft union, and comes into direct conflict with the industrial union movement. As a matter of fact, the Board has refused to determine the appropriate units or to hold an election in cases where there were two outside unions in a plant, both of whom were claiming the same employees as members of their unit. The "ducking" of its responsibility by the Board in such case seems, to say the least, somewhat hard upon the employer.

The whole matter of certifying representatives for collective bargaining purposes or holding an election for that purpose is entirely within the discretion of the Board, as distinguished from the Railway Labor Act, where it is mandatory on the Mediation Board to make such certification at the request of any group of employees if a dispute as to representation exists. Section 9 (c) of the Wagner Act leaves it to the absolute discretion of the Board as to whether it will certify representatives or hold an election. The rules and regulations issued by the Labor Board provide for a request on the part of an employee or employees for certification of representatives. They do not, however, provide for requests on the part of an employer of such nature, although there is no reason why under the Act they should not act at the request of an employer as well as an employee. It is probably well that for the time being it is not mandatory upon the Board to certify representatives or hold elections at the request of either the employees or the employer, inasmuch as elections may be demanded for improper purposes. However, there is no reason why the Board should not entertain requests from the employer as well as the employee where there are two conflicting labor organizations in his plant, each claiming the right of representation of all the employees. The fact that the determination of such a controversy may render the Board unpopular with labor unions who are defeated in an election should not prevent it from relieving the situation of an employer who is caught between fires of two contending unions.

So much for the questions arising in the application of the Act. What, if anything, should be done by way of improving the Act, as it now stands? In the first place, the Act has been criticized as being entirely one-sided. It purports to deal with labor relations in a comprehensive way, yet all the unfair practices specified may only be committed by employers. If the general principles laid down in the Act are sound, it should be the wish of both capital and labor that the law should be complied with, and certainly compliance with the law on the part of the employers would be much more easy to obtain if they felt that it was essentially an equitable one, dealing fairly with both sides in labor controversies. There has been much talk in Washington recently about delaying amendments to the law until more experience has been gained with it. It would seem that with respect to amendments of the law which are designed merely to clarify ambiguities and uncertainties in the existing provisions, it might be well to delay action until more experience has revealed the scope and extent of the uncertainties which need clarification. No such argument, however, has any force with respect to entirely new provisions designed to place reasonable restrictions on the employee with respect to his right of self-organization and collective bargaining. It is inevitable that some such restricting amendments will sooner or later be passed. The sooner they are devised and tried out in the light of actual experience, the better it will be for everyone concerned.

In framing amendments imposing restrictions on labor, the first principle to bear in mind is that mere prohibitions, in the absence of effective sanctions, are ineffective. The first thing to do after determining what the restrictions on labor organizations should be, is to devise effective sanctions. A leaf should be taken from the book of the framers of the New Deal legislation at Washington, who are masters at this particular art, employing such devices as taxation and denials of the use of the mails, telephone, etc., as sanctions for the enforcement of the prohibitions of various legislation. It is not suggested that these particular sanctions should be employed, but this is the type of enforcement provision that framers of amendments must devise. The sanction that most readily occurs, is, of course, the denial of the privileges conferred by the Act upon labor organizations who are guilty of violation thereof.

Assuming that effective sanctions can be devised to enforce reasonable restrictions on the rights of labor, what shou'd these restrictions be? It is submitted that it should be an unfair labor practice for any labor organization to coerce or intimidate any employees, whether by acts of physical violence or otherwise, into becoming members of a labor organization. Every employee should have the free and untrammeled right to join or not to join a labor organization as he sees fit, free from

the coercion of his employer or his fellow employees.

Sit-down strikes should be made an unfair labor practice.

An attempt should be made to codify the common law and define illegal strikes. In this category should fall strikes called for organization purposes where no bona fide labor dispute exists, as for example, where no demands have ever been presented to the employer and no attempts at collective bargaining with him have been made. Consideration should be given to the inclusion of general strikes designed to coerce a whole community and to cause it hardship or inconvenience. This type of strike has already been made illegal by English legislation.

Any type of picketing in furtherance of an illegal strike should be prohibited.

The common law limitations on the right of picketing in furtherance of lawful strikes should be codified, and any type of picketing exceeding the limitations should be declared to be an unfair labor practice.

In order to prevent racketeering and misuse of funds, labor organizations should be required to have their accounts audited annually, and a report of their receipts and disbursements made to their members.

Powers of mediation should be given the Labor Board and its duly authorized representatives similar to the powers of mediation granted the Labor Board under the Railway Labor Act.

There is no reason for delay in the preparation and enactment of amendments along the lines above suggested. Proposals for amendments, such as those made above, should be carefully studied before being put forth, and should not be framed so as to be unduly oppressive on labor. They should preserve the ultimate right of labor to strike in furtherance of lawful ends, but should qualify that right by a waiting period during which mediation efforts can be put forth.

Whether Industry likes it or not, the principle of collective bargaining has now become firmly established. In the judgment of the writer, it is necessary and reasonable to affirm that right and to afford reasonable safeguards for its protection. The Wagner Act, in the main, accomplishes that purpose. If amendments can be made to the Act to remove its one-sided feature, thereby making it more acceptable to Industry, and removing the feeling that it is an inequitable and unjust law, the interests of both capital and labor will be served. Industry will be well advised to abide by the law strictly and in good faith, and in the meantime should put forth its efforts to amend the law so as to make it clear, unambiguous and fair and equitable to both sides of the ever-recurring controversy between labor and capital.

LAY ORGANIZATION DEMANDS BETTER METHOD OF SELECTING STATE JUDGES

Chamber of Commerce of State of New York, Following Report of Special Committee, Adopts Resolution Deploring the Prevalent Wide and Increasing Interference of Partisan Politics with Operation of Courts in New York City and Its Regrettable Influence upon the Selection, Calibre and Conduct of the Judiciary—Pledges Itself to Organization of Concerted Move to Secure Reforms in Methods of Selecting Judges in City and in Foreclosure Procedure now in Effect—High Lights of Special Committee Report.

INFLUENTIAL support was given to the efforts for better methods of selecting the judges of State Courts, when the Chamber of Commerce of the State of New York, at a meeting on June 3rd, adopted unanimously the report of its Special Committee and the following resolutions recommended by that Committee:

"RESOLVED, That the Chamber of Commerce of the State of New York is convinced of the prevalent, wide and increasing interference of partisan politics with the operation of the State courts in New York City and of it regrettable influence upon the selection, calibre and conduct of the judiciary, and is firmly of the opinion that measures should be taken to change laws and practices which favor or make possible this condition; and be it further

"RESOLVED, That the Chamber of Commerce is convinced that the system for the foreclosure of mortgages in the City of New York is extravagant, grossly wasteful and imposes a needless and unjustified burden upon litigants in foreclosure matters; and be it further

"RESOLVED, That the Chamber of Commerce pledges itself to the organization of a concerted move to secure reforms in the method of selecting judges and in foreclosure procedure in this city, and directs its officers and its Special Committee on Law Reform to devote their efforts to this end."

Under the presidency of Winthrop W. Aldrich, the New York State Chamber of Commerce pledged active support of the efforts of the American Bar Association and other organizations to bring about the adoption of improved ways of selecting State Court Judges and keeping them independent of political control. The Chamber will concentrate its endeavors on bringing about such changes within the City of New York. The Chamber's representative Special Committee on Law Reform, which made a comprehensive study

of the subject and submitted a notable report, is composed of Messrs. Howard Ayres, *Chairman*, Charles L. Bernheimer, John D. Dunlop, Lawrence B. Elliman, Robert D. Sterling, and Charles A. Weil. In making their report, the Special Committee cautioned that it "is in no way to be construed as a criticism of Appellate Courts."

In support of its recommendations, the report unanimously adopted by the Chamber of Commerce of the State of New York "presents a study of political patronage in the Courts of New York City", and says:

"It is time to bring the facts concerning this evil out into the open. Discussion is useless if we mince words. If the facts are ugly, it is not we who make them so, and a veil of circumlocution or nice language will not remedy them.

"So we present the facts—and in our summary of the study we have limited ourselves to facts. In our subsequent comment, however, we have expressed opinions—opinions which we hold as citizens and as business men who were educated to respect the courts and wish and demand that that respect be restored.

"The facts are:

"1. During the year 1933, 2,823 individuals received 15,858 appointments or earned commissions in mortgage foreclosures in the Supreme Court, New York and Bronx Counties. The great majority of these appointees were active workers for the major political organizations of the two counties.

"2. Fees totalling $1,713,472.73 were awarded by the judges of the court to the appointees, payable out of the foreclosure estate. At least $1,422,792 of this sum was sheer waste so far as any benefit or service to the plaintiff-mortgagee was concerned.

"3. In many cases fees were paid to appointees with the approval of the court which they had not earned and to which under clear principles of law they were not entitled. In other cases fees were paid to appointees with the approval of the court in excess of a definite statutory limitation on their amount.

"4. The majority of these appointees were known by the judge or other person appointing them to be active political workers, and they were named for no other apparent reason. Such appointments are part of an established system in which the courts are deliberately and consciously used as a means of building up and maintaining political organizations.

"We have not made the same statistical analysis of the appointments in the City Court, special guardians and guardians ad litem in the Surrogates Court and lunacy commissions and assignments of defense counsel in the Criminal Courts, but we know of no reason for changing our belief, expressed in our 1934 report, to the effect that the 'system' permeates these courts as well. Nor is the system confined to the First Department. We believe the same kind of study would reveal similar conditions in Kings, Queens and Richmond.

"Our criticism of politics in the courts is not partisan. There is no distinction between the Democratic and Republican organizations in their attitude toward the distribution of patronage by the bench. Of course, it is evident that through the fortune of politics in New York City most of the judges, and hence most of the patronage, is Democratic. If the Republican machine controlled the votes, the same system would be maintained for its benefit.

"There are two essentials in this system. One is a judge who will serve the system by making political appointments. The other is machinery of foreclosure which provides sufficient appointments and fees to make it worth while.

"The results of the system are judges who are selected primarily for their political service and value and not for their ability and fitness for the Bench; delay, waste, inefficiency, and grossly inflated expense in foreclosures, at the cost of the mortgagee; a cynical attitude of the general public toward the integrity and worth of the Bench and the judicial system; and a political organization accustomed to, and built up on, support from the property owner and taxpayer through court fees."

In making it clear that their criticisms are "directed at the system and not at individuals," the report says:

"The picture is not a uniform black. There are judges who make and approve only appointments and fees which are required by the law or justified in terms of service. There are appointees who accept only mandatory or necessary appointments, work conscientiously and effectively, and accept only legal and reasonable fees. We regret that they cannot be identified so that the onus of this report may not be shared by them. But they have become involved in the system, and we can only acknowledge that there are such individuals, not to be charged with its vicious features.

"Nor do we attack any appointee *as an individual*. We have no facts to show personal dishonesty in any particular case. It is the system which we attack—thousands of cases taken together, year after year, which lead to the mulcting of the public, temptation of the Bar, discrediting of the Bench and the prostitution of the courts for political ends."

As to the way to bring about a "correction of the system," the Committee report says:

"While either of the two essentials exist—a complaint judge, and valuable appointments to be made by him—the political organizations can afford to surrender neither. They must surrender both. Whether or not the Bench and the Bar realize it, our courts and our legal systems are neither respected nor trusted by laymen. There are other reasons, but none more dangerous than a widespread disbelief both in the integrity and the ability of our judges. If this cynicism goes too far, it is still the natural result of the facts stated. It is also the result of the open 'deals' for judicial office, and the open political dictation of appointments and nominations, which have received so much publicity in the last five years.

"We believe that an exceptional opportunity is presented today to eliminate political patronage from the courts in this city and to change the method of selecting judges so that they will be chosen for ability and not for party service. There is an awakened public interest in all phases of government. Over and above this general interest is an active and independent concern for the better and more efficient organization of the courts and for the selection of able judges free from the suspicion of political domination. This interest is nation-wide. A tide is running in our favor and we must take it.

"A constitutional convention for New York State is to be chosen in November, to meet in April, 1938. It is the proper occasion to adopt a method for selecting judges free from political considerations. The 11 months before the convention offer the opportunity for public education and the organization of public support.

"Concurrently legislation must be secured reforming the foreclosure system. It must be reformed both because it is part of this system of political patronage, and because, in addition, it imposes a heavy burden of needless expense on the litigant. As business men we are interested in the latter factor independently. The demon-

stration of the facts in this connection is a by-product of our study of patronage and will be presented as a separate consideration.

"The opposition to both changes will be bitter. Normally the political organizations will control both the convention and the legislature. From the political point of view, neither organization can afford to surrender the opportunity to control this patronage. They must both surrender. They must not be permitted to block reform."

The Special Committee limits its report and recommendations to the Courts within the City of New York, saying:

"It should be clearly understood that the facts stated and the recommendations made in this report are limited to New York City. We do not know conditions in the state outside of the city. *We do not ask the rest of the state to change either its method of selecting judges or its method of foreclosures.*

"But we do ask our up-state neighbors to realize the conditions under which we suffer and to give us their consent and aid in securing changes for the city. Since legislation and constitutional amendment are necessary we must have their help.

"There is no practical difficulty in selecting judges by one method in the city and another outside. This was recently proposed in California, distinguishing between Los Angeles and the rest of the state."

Within its limitations as to time and finances, the Committee confined itself to a study of appointments in foreclosure actions in the Supreme Court in New York County and The Bronx in the year 1933, and examined some 3500 cases, as giving "a sufficient cross-section of political patronage in the Courts to present a fair and sufficiently comprehensive picture." With 3500 cases, the Committee was able to trace 15,858 appointments, divided among a group of 2,823 individuals, and to analyze the political connections said to be responsible for most of them. The Committee presents the results of its investigations and analyses in full detail. Space does not permit this phase of the report to be further summarized, beyond the fact that, according to the report, the total fees paid in 1933 to these appointees in 3500 foreclosure proceedings amounted to $1,713,472.71.

The report describes in vivid fashion its conclusions as to the manner in which State Court judges are nominated and elected:

"A Supreme Court Judge in the First Department is elected by the voters of New York and Bronx County together. The Democratic party in these counties for 15 years has had a safe plurality which now exceeds 300,000 votes, even in 'off' years (1933 excepted). The Democratic nomination, therefore, is equivalent to election.

"Theoretically the nominee is chosen by a judicial convention, but since the members are hand-picked by the district organizations, and accept the determination of the county leaders without debate, the convention's action is a rubber stamp.

"Conceivably the leaders of the two counties might disagree, but in fact they have a practical working arrangement as to the number of judges to come from each county.

"Theoretically the voters might rebel at a bad nominee and elect his opponent. But since this has not happened for 17 years and meanwhile the Democratic majorities have grown considerably, we prefer to face the situation realistically. As long as the elective system continues, the choice of the county leader of the dominant party will be the successful candidate, no matter how or why he is selected, nor what his ability or fitness.

"The Republican organizations follow precisely the same practices and considerations.

"The same situation exists in the Second Judicial District, which includes the counties of Kings, Queens and Richmond, except that a normal Republican majority in the counties of Nassau and Suffolk somewhat reduces the aggregate Democratic majority.

"How then does the County leader proceed to select his candidate?

"The party candidate must obviously be a member of that party. That automatically rules out every lawyer of ability who is of the opposite party.

"Next, as a matter of practical politics, he must come from a given racial and religious group. If the vacancy was occupied by a Catholic, his successor must be a Catholic; if by a Jew, then a Jew; if a Protestant, then a Protestant; and so on.

"Next is the question of the district from which he shall come. Each leader claims his share of patronage. Out of the group there will be a certain number possessing candidates with the proper racial and religious qualifications. The problem is to determine between their respective claims.

"Weighing these claims is an elaborate matter. What strength does that particular district leader contribute to the County organization? If the leader consistently rolls up majorities of 3, 4, or 10 to 1, if he is the principal in a group of district leaders, if he has powerful allies in the State and National Government, obviously he can demand a larger share of patronage than the weaker district leaders. What other offices have already been distributed to his constituents? Does he have his share of big jobs in the form of City Commissionerships, elective county offices, federal judgeships or similar positions which pay large salaries and are, therefore, fitted for his principal lieutenants? If so, then his claim is likely to be passed over for one less fortunate in prior distributions. The proportion of patronage distribution is one which can never be worked out mathematically, and yet is maintained on a realistic basis by an astute leader.

"Only when these considerations have been weighed, does the opportunity arise to ask, what is the ability of the prospective nominee? What is his suitability for the job? If, as between two candidates whose leaders have equal claim on the nomination, one is able, honest and industrious, and one is weak, we have little doubt that the County leader will pick the better man. We do not subscribe to the view that the County leader goes out of his way to lower the calibre of the Bench. Simply as a matter of practical politics he must weigh these other considerations first before he can afford the luxury of estimating character and ability.

"Of course the considerations we have named are not the only ones which play a part. Perhaps the Governor has made an interim appointment of his own choice and for practical reasons it is not worth while to fight the Governor by nominating another. Perhaps the County leader lacks the control which he needs over the county organization and finds it worth while to gather support among his district leader critics.

"Whatever the other motives for a nomination, always the leader will be sure that he can count on the nominee to participate in patronage distribution."

The Committee's summation of its report and conclusions is as follows:

"After the recital of the foregoing facts there can hardly be question as to the reasons why particular individuals are selected as judges of the Supreme Court in

this City, nor of the effect of the system on the calibre of the bench.

"It is unfair to the judge who is able and honest that, to secure and retain his position, he must subordinate himself to and become a cog in this system.

"The system must be changed. The bench should have the complete respect and confidence of the public. The facts stated show why that has been impaired.

"We are entitled to judges who are selected for their ability and fitness alone, who are not selected for political motives or service, and who are free from political control or the suspicion thereof.

"We are entitled to courts and a judicial system which operate in the interest of the litigant, efficiently and inexpensively, and which are not designed and operated to fatten political workers on appointments and fees. We are entitled to an economical, speedy and efficient foreclosure system, both for the benefit of the litigant and also because it is one of the major elements which tends to fasten the system of political patronage on the courts."

As to bringing about "reforms in the method of selecting judges," the report adopted unanimously by the Chamber of Commerce of the State of New York says:

"We have called attention to the constitutional convention which will convene in the Spring of 1938. It is the proper time for consideration of changes in the method of selecting judges, designed to remove them from politics.

"We do not think it appropriate now to present a single proposal to which the Chamber shall be limited in its support. We summarize a number of devices which have been proposed, all of which are suggestive for adaptation to New York. If others are advanced, we hope that they may be considered with open minds, so long as the definite goal is kept in mind and the proposals promise to attain them.

"We recognize frankly the fact that any change in the method of selecting judges for upstate counties may be unacceptable to those counties. *Therefore we urge no state-wide change, but only a change applicable to the City of New York.* Conditions in this city are different and different provisions should be made to meet them.

"Because of the up-state attitude we do not urge appointment by the Governor. We recognize frankly that in general the up-state judges are able and fit, and the elective system works satisfactorily. We recognize that, with Democratic Governors in Albany, Democratic judges would be put on the bench in up-state counties if the appointive system prevailed, and that these counties with normally Republican majorities will not accept this system."

The report then sets forth and comments upon the California system, the methods proposed by the State Bar organizations in Ohio and New Mexico, and the resolutions adopted by the House of Delegates of the American Bar Association in Columbus, Ohio, on January 7, 1937 (published in the JOURNAL for February, 1937, at page 105). A plan suggested in 1934 by Judge Edward R. Finch, now of the New York Court of Appeals, is also set out.

As to the adaptation of these proposals to judicial selection within the State and City of New York, the Committee's report says:

"Purely for illustration and without any intention of committing the Chamber or the Committee to this particular idea, we suggest a possible adaptation of these schemes to fit conditions in New York City. There are four judicial departments in the State. *With initial application to New York City only,* councils on qualifications might be authorized for each of the four departments, so that each council itself might be representative of local opinion and conditions, and so that each should prepare lists, with first-hand knowledge of the qualifications of the persons suggested. These local councils might consist of the Presiding Justice of the Appellate Division in each Department, a State Senator or an Assemblyman from the Department, and a president of a local Bar Association in the Department, a lawyer and a layman, the last three to be selected by the judges of the Appellate Division. This council might submit from three to five names to the Governor. The Governor would be required to name one. His appointee would go before the voters of the particular judicial district at the next general election, with no opponent and no party designation, solely for approval as in the California system. At the completion of a stated term, whether the present fourteen years or less, he should again go before the electorate under the same conditions. If at any time his continuance in office was not approved the vacancy would be filled as originally provided.

"But since this system may not be desired up-state, *the constitution might well apply it initially to the counties of New York and Bronx in the First Department, and Kings, Queens and Richmond, in the Second Department only,* providing for two councils selected from those two territories as suggested. The system might then be extended to other divisions of the State on approval through a referendum vote, whenever the electors desired.

"The make-up of the council should guarantee that the names on the list are selected for ability and fitness and not for political reasons, but the local complexion of the council should guarantee that the list would not be chosen exclusively from a (local) minority party, as it might if a governor chose the nominee (as in California)."

In concluding their report, the Special Committee points out "that interest in the improvement of Judicial selection is manifested on (such) a National scale," and that the facts "indicate a ground swell of which we should take advantage." Accordingly the Committee said:

"We recommend that the Chamber pledge itself to organize a movement to secure the necessary reform through the Constitutional Convention and meanwhile to secure legislative amendment of the foreclosure statutes in accordance with the foregoing suggestions.

"As a first step we recommend that copies of this report be sent to such public officials as the officers of the Chamber be advised, and also to all commercial, civic, legal and other professional organizations in the State, and that their adherence to the movement be invited.

"We recommend that the officers of the Chamber or this Committee, or another special committee, be authorized and directed to take all additional steps that may occur to them to organize a successful movement. This will necessarily include securing adequate financial support, enlisting the press in the campaign, the organization of state-wide committees, arrangements for the distribution of facts and of literature, arrangement of meetings, reconciliation of views between up-state communities and this city, and a general campaign of public education.

"If the movement is properly initiated and conducted we have every right to expect a united support and a successful outcome."

AMERICAN BAR ASSOCIATION JOVRNAL

BOARD OF EDITORS

EDGAR B. TOLMAN, Editor-in-Chief.....Chicago, Ill.
R. E. LEE SANER, Chairman.....Dallas, Texas
FREDERICK H. STINCHFIELD, President, Ex-Of.....Minneapolis
GEORGE MAURICE MORRIS, Chairman House of Delegates, Ex-Of.....Washington, D. C.
HERMAN OLIPHANT.....Washington, D. C.
GURNEY E. NEWLIN.....Los Angeles, Cal.
CHARLES P. MEGAN.....Chicago, Ill.
WALTER P. ARMSTRONG.....Memphis, Tenn.

Subscription price to individuals, not members of the Association, $3 a year. To those who are members of the Association the price is $1.50 and is included in their annual dues. Price per copy, 25 cents.

JOSEPH R. TAYLOR
MANAGING EDITOR
Journal Office: 1140 N. Dearborn Street
Chicago, Illinois

RENEWED EFFORTS ARE NECESSARY

Mid-summer brings the Court issue to the stage of debate and decision. As reported by the Chairman of the Association's Special Committee on the proposals as to the Supreme Court, whose statement appears elsewhere in this issue, there is great need that all citizens who oppose the re-making of the Courts shall renew and re-double their efforts without delay, if legislative change in the Courts is to be defeated.

Recent developments in this country, as well as in other lands, have enhanced the need that the Federal judicial system shall be kept free from control by the other branches of government. Controversies and uncertainties multiply, which require the arbitrament of impartial and law-governed Courts. Like the three tailors of Tooley Street, who began their petition with "We, the people of England," minorities in this country are demanding rights and immunities paramount to those of majorities, and there is danger that the rights of majorities as well as minorities will be denied, through the use of force by minorities, or by government itself, against citizens. Industrial disputes, with their extremes of assertion and action on both sides, are shown to foster in many individuals a state of mind depicted by Rudyard Kipling as to "the Led Striker"—

> "That bids him flout the law he makes,
> That bids him make the law he flouts,
> Till, dazed by many doubts, he wakes
> The drumming guns — that have no doubts."

The surest safeguard of the rights of men and women during such a struggle is an independent and courageous judiciary, which can hold the balance true. The right of men to bargain collectively under conditions of equality, the right of men to work or to cease work, the right of employers to produce goods and to give employment, the right of communities to the observance of law and the maintenance of order without violence, require the ultimate and impartial interpretation and protection of untrammelled Courts. The new processes of enforcing the adjudication of disputes between employers and employees likewise require such Courts in the background, to fend against biased or arbitrary action. Such controversies could not be required to be submitted to the determination of judges selected by either of the parties to the dispute. Industrial controversy without impartial and fearless Courts would put great numbers of people at the mercy of mobs or government.

By decisive votes, the members of the American Bar Association have decided its attitude and action, in opposition to re-making the Courts. Lawyer non-members of the Association have voted in great numbers, to like effect. No individual member of the Association or the profession is bound, precluded or proscribed thereby. Every lawyer retains his freedom of opinion and action. Within the broad program and the democratic processes of the American Bar Association, there is room, and there is work, for lawyers of all kinds of economic and social philosophies. But the members of the Association have decided its stand, by impressive majorities. Lawyers and all other citizens who agree with the Association's stand should do what they can, in their own communities, to oppose and prevent the re-making of the Courts in such a time.

The lawyers oppose the re-making of the Courts by Act of Congress, such as the Logan-Hatch-Ashurst bill (S. 1392). They have taken the position that the independence of the Courts should not be destroyed, unless the States and the people ratify a constitutional amendment for that purpose. The Senate and the House should submit the issue to the people, in the form of a constitutional amendment.

A LAND-MARK IN THE LEGISLATIVE HISTORY OF FREE INSTITUTIONS

Long after the proposals to re-make the Courts of the United States have passed from legislative calendars, and even irrespective of the results of that momentous struggle, the report of the majority of the Judiciary Committee, recommending rejection of the reorganization plan, will be remembered, and will be re-examined, as chart and compass for those who strive to save the essentials of free government in America. There is hope and cheer in the fact that, at a time when the subservience of the legislative branch of government was feared, the Congress of the United States has produced a truly great state paper, notable for its courage and common sense and for its incisive, independent outlook upon the American scene. Great honor is due to the undaunted ten who drafted and proclaimed this resounding message; but a grateful people should long remember that many other members of the House and Senate have held no less tenaciously the same patriotic views which have been put to paper by the majority of the Senate Committee.

Summary of such a document could not do it justice; quotation of some of its salient paragraphs will best denote the quality of the report, which deserves full reading by every citizen. This report cannot be laughed aside as the cavil of conservatives, the fulmination of any Bar Association, or the preachment of any cloistered group of bigwigs out of touch with their times. No one could maintain that the ten distinguished lawyers who wrote and filed this report are members of any "cult of obstruction"; nearly all of them have been leaders in behalf of forward looking legislation, gallant warriors for many of the most advanced measures. Yet faithfully they have put to paper, in language which will live, the great and grave concern which men and women of all localities, political affiliations, and social philosophies, have felt, ever since it was proposed to destroy the independence of the Federal judiciary. This report is truly worthy of the high traditions of the American Bar; it voices the views so emphatically voted, by Association members and non-members in all States, in the referenda upon the Court proposals.

Basically, the report catches and makes clear the true significance of the proposals made to the Congress on February 5, 1937:

"We are told that a reactionary oligarchy defies the will of the majority, that this is a bill to 'unpack' the Court, and give effect to the desires of the majority; that is to say, a bill to increase the number of justices for the express purpose of neutralizing the views of some of the present members."

There is a great deal of vision and sound American philosophy in the Committee's rejoinder to this objective. Even if the charges made as to the views of some members of the Court were supportable—

"It is far better that we await orderly but inevitable change of personnel than that we impatiently overwhelm them with new members. Exhibiting this restraint, thus demonstrating our faith in the American system, we shall set an example that will protect the independent American judiciary from attack as long as this Government stands."

The whole report may be called a protest against impatience and force, a demand that orderly progress shall not be endangered by doing violence to the established procedures. All legislators and executives will do well to heed the trenchant warning:

"Constitutional democracy moves forward with certainty rather than with speed. The safety and the permanence of the progressive march of our civilization are far more important to us and to those who are to come after us than the enactment now of any particular law. The Constitution of the United States provides ample opportunity for the expression of popular will to bring about such reforms and changes as the people may deem essential to their present and future welfare. It is the people's charter of the powers granted those who govern them."

The purported justifications for the proposals to re-make the court are demolished in language as applicable to proposed "compromise" as to the original bill:

"We are told, but without authority, by those who would rationalize this program, that Congress was given the power to determine the size of the Court so that the legislative branch would be able to impose its will upon the judiciary. This amounts to nothing more than the declaration that when the Court stands in the way of a legislative enactment, Congress may reverse the ruling by enlarging the Court. When such a principle is adopted, our constitutional system is overthrown. . .

"When proponents of the bill assert, as they have done, that Congress in the past has altered the number of justices upon the Supreme Court and that this is reason enough for doing it now, they show how important precedents are and prove that we should now refrain from any action that would seem to establish one which could be followed hereafter, whenever a Congress and an Executive should become dissatisfied with the decisions of the Court."

The memorable report gives ground for confidence that the majority of the Committee will not be content merely to defeat a "compromise" involving the vicious principle of the original bill. There is stirring eloquence in their appeal that the present action shall be such as to set "a salutary precedent" assuring the independence of the Court in years to come:

"This is the first time in the history of our country that a proposal to alter the decisions of the Court by enlarging its personnel has been so boldly made. Let us meet it. Let us now set a salutary precedent that will never be violated. Let us, of the Seventy-fifth Congress, in words that will never be disregarded by any succeeding Congress, declare that we would rather have an independent Court, a fearless Court, a Court that will dare to announce its honest opinions in what it believes to be the defense of the liberties of the people, than a Court that, out of fear or sense of obligation to the appointing power, or factional passion, approves any measure we may enact. We are not the judges of the judges. We are not above the Constitution."

It is not surprising that there has been no minority report. So moving an indictment of the pending proposals cannot be answered; it could be overridden only by sheer force of votes that pay no heed to argument. Defeat is not likely to come to those who have raised high such a standard of logic and loyalty to free institutions. In demanding that the independence of the judiciary be kept unimpaired, these statesmen have vindicated no less the independence and the courage of the legislative branch of the government; and no one could afford to win by force a triumph over those vital principles. In any event, American lawyers are justly proud that ten of their number, in high place, have struck this great blow for liberty and for ordered progress under law. The Nation again has reason to be grateful to its lawyers, who have expressed so effectively the views of nearly all of the people.

The Cleveland Debate

THE first of a series of public meetings arranged as part of a field program was a debate at Cleveland on Friday, June 25, 1937 at 5:00 p. m. E.S.T.

The participants were—for the affirmative, Assistant Attorney General Joseph B. Keenan; for the negative, Senator Edward R. Burke from Nebraska; and Newton D. Baker presiding. The broadcast was over the Columbia network.

A large gathering turned out to hear the debate, including people from all classes of the community.

The meeting was held under the auspices of the Citizens' Committee, including Charles Follett, Atlee Pomerene, William A. McAfee, Lester Abele, and Fred S. Day.

The debate was prepared with the cooperation of the Special Committee on the Supreme Court proposal of the American Bar Association of which Sylvester C. Smith is Chairman, and the Special Committee of the Cleveland Bar Association of which Charles Follett is Chairman, and the other members of the Cleveland Bar Association. The officers of the Cleveland Bar Association were very helpful in attending to the details involved. These included Harry J. Crawford, the president; and A. V. Abernethy, the secretary. Mr. W. C. Warren, one of the younger lawyers in Cleveland, participated on behalf of the Junior Bar Conference in attending to many of the details.

The occasion furnished a fine example of what cooperative action by the lawyers and laymen can do on such an important subject, and the policy of the Special Committee of the A. B. A. in encouraging discussion of both sides of the subject and presentation of the facts to the people who must ultimately say what is to be carried out.

The Cleveland newspapers carried substantial publicity on the occasion and an announcement of the debate in radio columns in other parts of the country gave an opportunity to citizens throughout the land to listen in.

REVIEW OF RECENT SUPREME COURT DECISION

Court Upholds Constitutionality of Certain Provisions of Wisconsin Labor Code, as Applied—Dissenting Opinion Asserts the Construction Adopted Is Repugnant to Due Process and Equal Protection Clauses of the Fourteenth Amendment—Georgia Statute Prescribing Maximum Charges of Tobacco Warehousemen for Handling and Selling Leaf Tobacco Held Valid Exercise of State Power—Action to Recover Taxes erroneously Paid Is Equitable in Its Function, although an Action at Law—Tax Status of Royalties to Be Paid by the Assignee of an Oil and Gas Lease to the Assignors—Virginia Milk and Cream Act Establishing Commission with Power to Fix Maximum and Minimum Prices and to License Distributors Upheld

By Edgar Bronson Tolman*

State Statutes—Wisconsin Labor Code—Peaceful Picketing and Publicity in Labor Disputes

The provisions of the Labor Code of Wisconsin, as applied, are valid under the Constitution to the extent that they declare peaceful picketing and publicity of facts in a labor dispute to be lawful, where such means are resorted to for the purpose of inducing a tile contractor to unionize his shop and, in that connection, to refrain from working with his own hands in the performance of his contracts.

Senn v. Tile Layers Protective Union, Local No. 5, et al., 81 Adv. Op. 829; 57 Sup. Ct. Rep. 857.

This case deals with the constitutionality of provisions of the Wisconsin Labor Code. The provisions in question authorize giving publicity to labor disputes, legalize peaceful picketing and patrolling and prohibit injunctions against such conduct.

The appellant brought suit in a state court to enjoin the appellees from picketing and from publishing that the appellant was unfair to organized labor or to the unions. The defendants answered and the case was heard on extensive evidence. In the findings of the trial court it appared that the journeymen tile layers in Milwaukee to a large extent were members of the Tile Layers Protective Union, Local No. 5, and the helpers are members of the Tile Layer Helpers Union, Local No. 47. Senn, the appellant, was engaged in Milwaukee in the tile contracting business under the name of "Paul Senn & Co., Tile Contracting." His business was a small one, conducted, in the main, from his residence and he employed one or two journeymen tile layers and one or two helpers. He also worked with his own hands in the trade and performed, personally, much work commonly done by a tile layer or a helper. Neither Senn nor his workmen belonged to a union at the time the suit started. Senn was not eligible for membership since he had not served the apprenticeship required by the union rules. Among other rules applicable to employers conducting a union shop, the following rule was prescribed by the union:

"Article III. . . . no individual, member of a partnership or corporation engaged in the Tile Contracting Business shall work with the tools or act as Helper but . . . the installation of all materials . . . shall be done by journeymen members of Tile Layers Protective Union Local No. 5."

The union sought to induce Senn to become a union contractor and asked him to execute an agreement in form substantially like that entered into by other contractors in Milwaukee. Senn stated his willingness to sign an agreement provided Article III was eliminated. This the union declared impossible, stating that Article III was essential in maintaining wage standards and spreading work among the membership and that, moreover, it would discriminate against other union contractors who had signed agreements containing this Article. Consequently, Seen refused to sign the agreement or to unionize his shop. As a result, the unions picketed his place of business. It was found that the picketing was peaceful, without violence or any other unlawful act. It was also found that the pickets carried banners, one stating "P. Senn Tile Company is unfair to the Tile Layers Protective Union," and another, "Let the Union Tile Layer Install Your Tile Work."

The trial court denied an injunction and dismissed the bill, finding that the controversy was a labor dispute within the meaning of the Wisconsin statutes, and that the picketing was lawful under such statutes. It found, moreover, that it was not unlawful for the defendants "to advise, notify or persuade, without fraud, violence or threat thereof, any person or persons, of the existence of said labor dispute; . . .

"That the agreement submitted by the defendants to the plaintiff, setting forth terms and conditions prevailing in that portion of the industry which is unionized, is sought by the defendants for the purpose of promoting their welfare and enhancing their own interests in their trade and craft as workers in the industry.

"That Article III of said agreement is a reasonable and lawful rule adopted by the defendants out of the necessities of employment within the industry and for the protection of themselves as workers and craftsmen in the industry."

On appeal the State Supreme Court affirmed the judgment, with two judges dissenting. On further appeal the Federal Supreme Court affirmed the judg-

*Assisted by James L. Homire.

ment by a divided bench, the prevailing opinion being delivered by MR. JUSTICE BRANDEIS.

The opinion first dealt with a motion to dismiss for want of jurisdiction on the ground that no substantial federal question was presented, and, in the alternative, that independent non-federal grounds were adequate to sustain the judgment. This motion was denied, because it sufficiently appeared that the validity of the Wisconsin Labor Code under the Fourteenth Amendment had been duly challenged at the trial, and that the rulings of the state courts were based on the Code.

Dealing with the merits, the opinion discussed the question whether the statute, as applied to the facts, took Senn's liberty or property or denied to him equal protection of the laws. Senn's contention was that the right to work in his own business with his own hands is a right guaranteed by the Fourteenth Amendment and that the state might not authorize unions to employ publicity and picketing to induce him to refrain from exercising that right. The opposing contention of the unions was stated as follows:

"The unions concede that Senn, so long as he conducts a non-union shop, has the right to work with his hands and tools. He may do so, as freely as he may work his employees longer hours at lower wages than the union rules permit. He may bid for contracts at a low figure based upon low wages and long hours. But the unions contend that, since Senn's exercise of the right to do so is harmful to the interests of their members, they may seek by legal means to induce him to agree to unionize his shop and to refrain from exercising his right to work with his own hands. The judgment of the highest court of the state establishes that both the means employed and the end sought by the unions are legal under its law. The question for our determination is whether either the means or the end sought is forbidden by the Federal Constitution."

In reaching a decision on the question whether the means or the end sought is forbidden by the Fourteenth Amendment, the Court first pointed out that picketing and publicity are not prohibited by that amendment, that freedom of speech includes the right to make known the facts of a labor dispute, and that a state may regulate the methods and means of publicity and the use of public streets. The legislative action in respect of these means was then summarized thus:

"The Legislature of Wisconsin has declared that 'peaceful picketing and patrolling' on the public streets and places shall be permissible 'whether engaged in singly or in numbers' provided this is done 'without intimidation or coercion' and free from fraud, violence, breach of the peace or threat thereof.' The statute provides that the picketing must be peaceful; and that term as used implies not only absence of violence, but absence of any unlawful act. It precludes the intimidation of customers. It precludes any form of physical obstruction or interference with the plaintiff's business. It authorizes giving publicity to the existence of the dispute 'whether by advertising, patrolling any public streets or places where any person or persons may lawfully be;' but precludes misrepresentation of the facts of the controversy. And it declares that 'nothing herein shall be construed to legalize a secondary boycott.' Inherently, the means authorized are clearly unobjectionable. In declaring such picketing permissible Wisconsin has put this means of publicity on a par with advertisements in the press."

So far as the means employed were concerned, the Court noted that the findings showed that they were in accordance with the statute. *Truax v. Corrigan*, 257 U. S. 512, was held to be not applicable since there the statute was thought to have been applied in such manner as to legalize libelous and abusive epithets against the employer and his friends; libelous statements against his business and others, and intimidation directed against customers and employees.

The end sought by the unions was also held to be lawful under the Constitution. The propriety of that end was affirmed in the prevailing opinion, as follows:

"The end sought by the unions is not unconstitutional. Article III, which the unions seek to have Senn accept, was found by the state courts to be not arbitrary or capricious, but a reasonable rule 'adopted by the defendants out of the necessities of employment within the industry and for the protection of themselves as workers and craftsmen in the industry.' That finding is amply supported by the evidence.

"The laws of Wisconsin, as declared by its highest court, permit unions to endeavor to induce an employer, when unionizing his shop, to agree to refrain from working in his business with his own hands—so to endeavor although none of his employees is a member of a union. Whether it was wise for the State to permit the unions to do so is a question of its public policy—not our concern. The Fourteenth Amendment does not prohibit it."

The right to use truthful publicity in labor disputes to accomplish the end in view was sustained with the following comment:

"There is nothing in the Federal Constitution which forbids unions from competing with non-union concerns for customers by means of picketing as freely as one merchant competes with another by means of advertisements in the press, by circulars, or by his window display. Each member of the unions, as well as Senn, has the right to strive to earn his living. Senn seeks to do so through exercise of his individual skill and planning. The union members seek to do so through combination. Earning a living is dependent upon securing work; and securing work is dependent upon public favor. To win the patronage of the public each may strive by legal means. Exercising its police power, Wisconsin has declared that in a labor dispute peaceful picketing and truthful publicity are means legal for unions. It is true that disclosure of the facts of the labor dispute may be annoying to Senn even if the method and means employed in giving the publicity are inherently unobjectionable. But such annoyance, like that often suffered from publicity in other connections, is not an invasion of the liberty guaranteed by the Constitution. . . It is true, also, that disclosure of the facts may prevent Senn from securing jobs which he hoped to get. But a hoped-for job is not property guaranteed by the Constitution. And the diversion of it to a competitor is not an invasion of a constitutional right."

In conclusion, the Court declared that Senn suffered no denial of equal protection of the laws, in view of the ruling that the challenged statutory provisions are valid, as applied.

MR. JUSTICE BUTLER delivered a dissenting opinion in which MR. JUSTICE VAN DEVANTER, MR. JUSTICE MCREYNOLDS and MR. JUSTICE SUTHERLAND joined.

In the dissenting opinion the findings of the trial court were elaborated, and it was pointed out that although the trial court had found the picketing peaceful and lawful, it had not passed on certain other acts constituting pressure on the appellant; that the unions themselves had admitted that much that they had threatened and done to coerce him was unlawful, and stated in open court that some of their conduct would be discontinued.

The dissenting opinion then quoted the pertinent provisions of the Fourteenth Amendment and stated that decisions of the Court have made it known everywhere that such constitutional provisions forbid state action which would take from the individual "the right

to engage in common occupations of life, and that they assure equality of opportunity to all under like circumstances." The opinions of the Court, in various cases, were then cited in exposition of these rights, and the extent of a state's power to authorize picketing was described as follows:

"The legislative power of the State can only be exerted in subordination to the fundamental principles of right and justice which the guaranties of the due process and equal protection clauses of the Fourteenth Amendment are intended to preserve. Arbitrary or capricious exercise of that power whereby a wrongful and highly injurious invasion of rights of liberty and property is sanctioned, stripping one of all remedy, is wholly at variance with those principles. . .

"It may be assumed that the picketing, upheld in virtue of the challenged statute, lawfully might be employed in a controversy between employer and employees for the purpose of persuading the employer to increase pay, etc., and dissuading non-union workers from displacing union members. The right of workers, parties to a labor dispute, to strike and picket peacefully to better their condition does not infringe any right of the employer. . . But strikes or peaceful picketing for unlawful purposes are beyond any lawful sanction. The object being unlawful, the means and end are alike condemned."

MR. JUSTICE BUTLER declared also that the object the unions sought to accomplish was an unlawful one, saying:

"Admittedly, it is to compel plaintiff to quit work as helper or tile layer. Their purpose is not to establish on his jobs better wages, hours, or conditions. If permitted, plaintiff would employ union men and adhere to union requirements as to pay and hours. But, solely because he works, the unions refuse to allow him to unionize and carry on his business. By picketing, the unions would prevent him working on jobs he obtained from others and so destroy that business. Then, by enforcement of their rules they would prevent him from working as a journeyman for employers approved by the union or upon any job employing union men. Adhering to the thought that there is not enough work to go around, unquestionably the union purpose is to eliminate him from all tile laying work. And highly confirmatory of that purpose is the failure of the contract proposed by the union to permit plaintiff personally to do work in the performance of jobs undertaken by him for prices based upon union rates of pay for all labor, including his own.

"The principles governing competition between rival individuals seeking contracts or opportunity to work as journeymen cannot reasonably be applied in this case. Neither the union nor its members take tile laying contracts. Their interests are confined to employment of helpers and layers, their wages, hours of service, etc. The contest is not between unionized and other contractors or between one employer and another. The immediate issue is between the unions and plaintiff in respect of his right to work in the performance of his own jobs. If as to that they shall succeed, then will come the enforcement of their rules which make him ineligible to work as a journeyman. It cannot be said that, if he should be prevented from laboring as helper or layer, the work for union men to do would be increased. The unions exclude their members from jobs taken by non-union employers. About half the tile contractors are not unionized. More than 60 per cent of the tile layers are non-union men. The value of plaintiff's labor as helper and tile layer is very small—about $750 per year. Between union members and plaintiff there is no immediate or direct competition. If under existing circumstances there ever can be any, it must come about through a chain of unpredictable events making its occurrence a mere matter of speculation. The interest of the unions in the manual labor done by plaintiff is so remote, indirect and minute that they have no standing as competitors."

It was urged also that the picketing was unlawful because the signs carried constituted a misrepresentation of the facts in declaring Senn "unfair to the Tile Layers Union."

The dissenting opinion was concluded, as follows:

"The judgment of the state court, here affirmed, violates a principle of fundamental law: That no man may be compelled to hold his life or the means of living at the mere will of others. . . The state statute, construed to make lawful the employment of the means here shown to deprive plaintiff of his right to work or to make lawful the picketing carried on in this case, is repugnant to the due process and equal protection clauses of the Fourteenth Amendment."

The case was argued by Mr. Leon B. Lamfrom for the appellant, and by Mr. Joseph A. Padway for the appellees.

State Statutes—Georgia Act Prescribing Tobacco Warehousemen's Charges

The Georgia Act of 1935 prescribing maximum charges of tobacco warehousemen for handling and selling leaf tobacco is a valid exercise of the power of the State, does not offend against the Fourteenth Amendment, does not impose a direct burden upon interstate or foreign commerce and, consequently, is not in conflict with the commerce clause of the Federal Constitution.

Townsend & Bernard v. Yeomans, et al., 81 Adv. Op. 840; 57 Sup. Ct. Rep. 842.

In this opinion the Supreme Court sustained the validity of a Georgia statute fixing maximum charges of warehousemen for handling and selling leaf tobacco. The suit under review was instituted by the appellants, tobacco warehousemen, in a federal court in Georgia and was heard by three judges. Upon findings of fact and conclusions of law, the bill was dismissed with one judge dissenting. On appeal the decision was affirmed by the Supreme Court in an opinion by MR. CHIEF JUSTICE HUGHES.

The opinion reviews fully the findings of fact relating to the conduct of the business of marketing bright leaf tobacco which is used almost exclusively in the manufacture of cigarettes. It was found that the selling season is of short duration, that the crop is sold almost entirely to a limited number of cigarette manufacturers who send buyers to the markets, and that the markets are in towns in which there are tobacco warehouses. The Act fixes maximum warehouse charges at the same rate as the statutory fees fixed in North Carolina and South Carolina, but lower than the unregulated charges in existence in Georgia at the time the Act was passed. It was found also that the difference in money between the amount which the complainants would receive under the former schedule as compared with the statutory schedule of charges was $115,920.90. Since it was conceded at the bar that the business of tobacco warehouses is "affected with a public interest," little discussion was given to the question whether the business was subject to state regulation. The questions at issue were accordingly reduced to two, to-wit: (1) whether the charges fixed were confiscatory; and (2) whether the regulation attempts to govern transactions in the course of interstate and foreign commerce.

As to the question of confiscation, the Court found that it had not been proved and said:

"Confiscation is not shown. The presumption of reasonableness has not been overthrown. . . It is apparent that the return to the warehousemen will largely be governed by the volume and value of the tobacco crop. The

evidence relates chiefly to the years of the great depression and affords no appropriate criterion for a more normal period. Moreover, we find no sufficient ground for disturbing the finding of the District Court that the evidence did not satisfactorily establish what any warehouseman, individual or corporate, lost by reason of the prescribed scale of charge in contradistinction to its effect upon the warehousemen as a group. . . The burden resting upon appellants to make a convincing showing that the statutory rates would operate so severely as to deprive them, respectively, of their property without due process of law, was not sustained."

In dealing with the question whether the legislation attempts improperly to extend into the field of federal power, the Court observed that it was unnecessary to determine the extent of congressional power in view of the fact that no attempt has been made by Congress to regulate the charges of warehousemen. In this connection, the federal statute of 1935, known as "Tobacco Inspection Act," was discussed in considering appellant's reliance thereon. The Court observed that that Act has a limited objective and does not undertake to regulate the charges of warehousemen or to derogate from existing state legislation on that subject. It was designed to provide a system of grading tobacco, in order to enable farmers to class their tobacco in such manner as to meet the demands of the trade. After discussion of the provisions and purpose of the federal Act, MR. CHIEF JUSTICE HUGHES concluded that Congress has not undertaken to interfere with the operation of state laws affecting warehousemen's charges, and said:

" . . . We deem it to be highly significant that, in the light of existing practices and statutory regulations, the Congress carefully restricted its own requirements and did not attempt to interfere with the operation of state laws as to the amounts which warehousemen might charge. The purpose and terms of the federal statute negative any such intention. It is inconceivable that the Congress in endeavoring to aid the tobacco growers in sorting or 'grading,' and thus to facilitate the marketing of their tobacco, intended to deprive them of the protection they already had against extortionate charges of the warehousemen upon whom they depended in making their sales. Instead of frustrating the operation of such state laws, the provisions of the Act expressly afforded and emphasized the opportunity for cooperation with the States in protecting the farmers' interests. In this view we find no ground for the contention that Congress has taken possession of the field of regulation to the exclusion of state laws which do not conflict with its own requirements.

"The case calls for the application of the well-established principle that Congress may circumscribe its regulation and occupy a limited field, and that the intent to supersede the exercise by the State of its police power as to matters not covered by the federal legislation is not to be implied unless the latter fairly interpreted is in actual conflict with the state law."

Attention was then directed to the question whether the challenged legislation imposes an actual burden on interstate or foreign commerce, and an analysis of the statute led to the conclusion that no such burden was imposed. In this connection, the opinion states:

"Laying on one side the federal statute, as in no way inconsistent, we find no ground for concluding that the state requirements lay any *actual* burden upon interstate or foreign commerce. The Georgia Act does not attempt to fix the prices at the auction sales or to regulate the activities of the purchasers. The fixing of reasonable maximum charges for the services of the warehousemen in aid of the tobacco growers does not militate against any interest of those who buy. They pay the bid price, as accepted, and the warehouseman pays the seller, deducting from the purchase price the warehouse charges."

Finally, the Court discussed the appellant's contention that the Act must fall as repugnant to the existence of an exclusive federal power, even though such power was unexercised. In answer to this contention the Court pointed out that it ignores the principle that such ground of invalidity exists only in respect to those matters which demand a uniform system of regulation, and that in other matters, which allow of a diversity of treatment compatible with local conditions, the states may act within their respective jurisdictions until Congress sees fit to act. A proper application of these principles to the instant case was thought to sustain the Georgia Act, whose operation was summed up in the concluding paragraph of the opinion, as follows:

"Here, the Georgia Act lays no constraint upon purchases in interstate commerce, does not attempt to fix the prices or conditions of purchases, or the profit of the purchasers. It simply seeks to protect the tobacco growers from unreasonable charges of the warehousemen for their services to the growers in handling and selling the tobacco for their account. Whatever relations these transactions had to interstate and foreign commerce, the effect is merely incidental and imposes no direct burden upon that commerce. The State is entitled to afford its industry this measure of protection until its requirement is superseded by valid federal legislation."

The case was argued by Messrs. Robert C. Alston and William Hart Sibley for the appellants, and by Mr. O. H. Dukes and Mr. L. W. Branch for the appellees.

Taxation—Income Taxes—Recovery by Trustees of Tax Assessable Against Beneficiary—Equitable Defenses

An action to recover taxes erroneously paid is equitable in its function. Such an action may not be maintained by a trustee to recover an income tax erroneously paid by him which should have been paid by the beneficiary, where recovery would inure to the benefit of the latter.

Stone v. White, 81 Adv. Op. 850; 57 Sup. Ct. Rep. 851.

In this case the question for decision was whether testamentary trustees, who have paid a tax on the income from the estate which should have been paid by the beneficiary, are entitled to recover the tax, although the government's claim against the beneficiary is barred by the statute of limitations.

The trustees were acting under a testamentary trust providing for the payment of the net income to the testator's wife during her life. She elected to take the bequest in lieu of her dower or statutory interest. At that time some of the circuit courts of appeals had held that in such circumstances the income payments were annuities purchased by the widow through surrender of her dower interest, not taxable as income until they equal the dower interest. In view of these rulings the beneficiary did not include in her 1928 tax return any portion of income from the trust. A deficiency was assessed against the trustees which they paid under protest, before collection of the tax from the beneficiary was barred by limitation. After the statute of limitations had run, the Supreme Court held in *Helvering v. Butterworth*, 290 U. S. 365, that the income was taxable to the beneficiary and not to the trustees.

The suit under review was brought by the trustees to recover the tax, as erroneously collected, and the

collector interposed the defense that the tax which should have been paid by the beneficiary exceeded that paid by the trustees, and that, since any recovery would inure to the advantage of the beneficiary, the tax due from her could be set off against the trustees' claim. This defense was overruled by the District Court which gave judgment for the trustees. On appeal the Circuit Court reversed and sustained the contention of the collector. One judge concurred, denying the right of set off in view of the statutory bar, but holding that the trustees were not entitled to recovery in equity and good conscience.

On certiorari the judgment of the Circuit Court was affirmed in an opinion by MR. JUSTICE STONE. In the opinion, emphasis was placed upon the equitable function of an action brought to recover a tax erroneously paid, and on the rule that the equitable nature of the action entitles the defendant to show any state of facts which, in equity, would be a basis for denying recovery. The equitable aspect of the action and the defenses to it were pointed out in the following portion of the opinion:

"The action, brought to recover a tax erroneously paid, although an action at law, is equitable in its function. It is the lineal successor of the common count in *indebitatus assumpsit* for money had and received. Originally an action for the recovery of debt, favored because more convenient and flexible than the common law action of debt, it has been gradually expanded as a medium for recovery upon every form of quasi-contractual obligation in which the duty to pay money is imposed by law, independently of contract, express or implied in fact. . .

"Its use to recover upon rights equitable in nature to avoid unjust enrichment by the defendant at the expense of the plaintiff, and its control in every case by equitable principles, established by Lord Mansfield in *Moses* v. *Mac Ferlan*, 2 Burr. 1005 (K. B. 1750), have long been recognized in this Court. . . It is an appropriate remedy for the recovery of taxes erroneously collected. . . The statutes authorizing tax refunds and suits for their recovery are predicated upon the same equitable principles that underlie an action in assumpsit for money had and received. . . Since, in this type of action, the plaintiff must recover by virtue of a right measured by equitable standards, it follows that it is open to the defendant to show any state of facts which, according to those standards, would deny the right. . . even without resort to the modern statutory authority for pleading equitable defenses in actions which are more strictly legal."

In applying equitable principles to the case the Court stressed that under the will any recovery by the trustees would be income to the beneficiary and would deprive the government of the tax and enable the beneficiary to escape a tax which she should have paid. It was pointed out moreover that the fact that the revenue laws treat the trustee and the beneficiary as distinct entities does not deprive the Court of its equity powers or alter equitable principles which govern the type of action brought by the trustees.

In the circumstances, refund of the tax paid was held to result in no unjust enrichment to the government. In elaboration of this aspect MR. JUSTICE STONE said:

"Equitable conceptions of justice compel the conclusion that the retention of the tax money would not result in any unjust enrichment of the government. All agree that a tax on the income should be paid, and that if the trustees are permitted to recover no one will pay it. It is in the public interest that no one should be permitted to avoid his just share of the tax burden except by positive command of law, which is lacking here. No injustice is done to the trustees or the beneficiary by withholding from the trustees money which in equity is the beneficiary's, and which the government received in payment of a tax which was hers to pay. A single error on the part of the taxing authorities, excusable in view of persistent judicial declarations, has caused both the underassessment of one taxpayer and the overassessment of the other. But the error has not increased the tax burden of either, for whether the tax is paid by one or the other, its source is the fund which should pay the tax, and only the equitable owner of the fund is ultimately burdened. . . Since in equity the one taxpayer represents and acts for the other, it is not for either to complain that the government has taken from one with its right hand, when it has, because of the same error, given to the other with its left."

Attention was given also the trustees' contention that recovery is precluded by Section 275(a) of the Revenue Act of 1928 barring a proceeding in court for the collection of a tax after the prescribed period and by § § 607 and 609 which are claimed to prohibit credit of an overpayment against a barred deficiency. In rejecting this contention, the Court said:

" . . . Section 607 provides that any tax assessed or paid after the expiration of the period of limitation shall be considered an overpayment, and § 609 declares that a credit against a liability, in respect of any taxable year, shall be void 'if any payment in respect of such liability would be considered an overpayment under section 607.'

"These provisions limit the collection of a tax, and prevent the retention of one paid after it is barred by the statute. They preclude, in a suit by the taxpayer against the collector or the government, reliance on a claim against the taxpayer, barred by statute, as a set off, or counterclaim. But it would be an unreasonable construction of the statute, not called for by its words, to hold that it is intended to deprive the government of defenses based on special equities establishing its right to withhold a refund from the demanding taxpayer. The statute does not override a defense based on the estoppel of the taxpayer. . . The statutory bar to the right of action for the collection of the tax does not prevent reliance upon a defense which is not a set off or a counterclaim, but is an equitable reason growing out of the circumstances of the erroneous payment, why petitioners ought not to recover.

"Here the defense is not a counter demand on petitioners, but a denial of their equitable right to undo a payment which, though effected by an erroneous procedure, has resulted in no unjust enrichment to the government, and in no injury to petitioners or their beneficiary. The government, by retaining the tax paid by the trustees is not reviving a stale claim. Its defense, which inheres in the cause of action, is comparable to an equitable recoupment or diminution of petitioners' right to recover. 'Such defense is never barred by the statute of limitations so long as the main action itself is timely.' . . "

MR. JUSTICE ROBERTS was of opinion that the judgment should be reversed.

The case was argued by Mr. Thomas Allen for the petitioners, and by Mr. J. Paul Jackson for the respondent.

Taxation—Income Taxes—Assessment Against Assignee of Payments in Kind to Assignor under Oil and Gas Lease

Under an assignment of an oil and gas lease, payments in kind to the assignor are not assessable as income to the assignee of the lease who operates the wells, where, under the terms of the assignment, the oil to be paid as royalty to the assignor is withheld from the grant to the assignee.

Thomas v. Perkins, 81 Adv. Op. 870; 57 Sup. Ct. Rep. 911.

This opinion disposed of a question as to the tax status of royalties to be paid by the assignee of an oil and gas lease to the assignors. The assignee took the wells under an assignment which recited that the

owners of rights under the lease, in consideration of a certain cash payment "and of the further sum of Three Hundred Ninety Five Thousand Dollars ($395,000) to be paid out of the oil produced and saved from . . . the lands, and to be one-fourth of all the oil produced and saved . . . until the full sum . . .. is paid . . . do hereby bargain, sell, transfer, assign, and convey all our rights, title, and interest in and to said leases and rights thereunder." The assignment further provided that the oil payments should be made to the assignors out of the oil produced and saved from the leased premises "which payments shall be made by the pipe line company or other purchaser of said oil, and shall be one-fourth (¼) of all the oil produced and saved from the above described land, until the full sum . . . is fully paid." It was further agreed that the $395,000 was to be payable out of oil only, if, as and when produced from the lands, and that "said oil payment does not constitute and shall not be a personal obligation of the assignee, its successors or assigns." It was also provided that the oil payment should bear none of the expenses of the development of the leases or any other burden. No lien was reserved.

In accordance with these provisions the respondents, in their tax return for 1933, did not include as income any part of the proceeds that went to the assignors. The Commissioner, however, charged to the respondents the amounts received by the assignors and allowed the respondents depletion in respect of such amounts. In a suit to recover the portion of the tax assessed by reason of the inclusion in the respondents' taxable income the amounts paid to the assignors, it was shown that the established practice of the bureau was not to require the operator of an oil and gas lease to include as part of his income royalties payable in kind to lessors, but in the case of cash payments the operator included the proceeds of all the oil and took as an off-setting deduction the amounts of royalties paid. It was conceded that if the assignors' payments are to be excluded the depletion allowed to the taxpayers should be correspondingly reduced. The question for decision was whether the respondents' gross income should include moneys paid to assignors by purchasers of the oil. The trial court gave judgment for the collector but its decision was reversed by the Circuit Court of Appeads. On certiorari, the latter ruling was affirmed by the Supreme Court in an opinion by MR. JUSTICE BUTLER.

In reaching a decision of the question, the Court emphasized that under the assignment the oil paid to the assignors had been retained by them and was not derived by virtue of any transfer to them by the assignee. This feature of the case was elaborated by MR. JUSTICE BUTLER in the following portion of his opinion:

"We need not decide whether technical title to the oil while in the ground was in assignors or in assignee. The federal income tax Act is to be given a uniform construction of nation-wide application except insofar as Congress has made it dependent on state law. The granting clause in the assignment would be sufficient, if standing alone, to transfer all the oil to the assignee. It does not specifically except or exclude any part of the oil. But it is qualified by other parts of the instrument. The provisions for payment to assignors in oil only, the absence of any obligation of the assignee to pay in oil or in money, and the failure of assignors to take any security by way of lien or otherwise unmistakably show that they intended to withhold from the operation of the grant one-fourth of the oil to be produced and saved, up to an amount sufficient when sold to yield $395,000.

"The construction that the parties put upon the assignment makes for the same conclusion. There is no suggestion that, having taken title, the assignee transferred any of the oil back to assignors. The division orders designated, and so served to indicate ownership of, the quantities belonging to each of the interested parties. And, in the circumstances, the orders given and proceeds received by assignors necessarily covered and were derived from oil not transferred by the assignment."

Palmer v. Bender, 287 U. S. 551, and *Helvering v. Twin Bell Syndicate,* 293 U. S. 312, were cited in support of the conclusion as to ownership of the oil in the circumstances involved.

The opinion was concluded, as follows:

"As Hammonds and Branson, the assignors in this case, would be entitled to an allowance for depletion in respect of the oil sold out of their share, the income from that interest is not chargeable to respondents, Perkins and Wife. It follows that the commissioner erred in including in their income the payments made by purchasers to assignors for their share of the oil."

MR. JUSTICE STONE and MR. JUSTICE CARDOZO were of the opinion that the judgment should be reversed. Their views were briefly expressed in the following opinion:

"Mr. Justice Stone and Mr. Justice Cardozo think the oil and gas produced by the assignee of the lease, and their proceeds, were his income and not any the less so because he agreed to apply a part to payment of the purchase price of the lease, and gave an equitable lien to secure the payment. Whether the purchase price, when paid, represented a capital gain taxable to the assignors, and whether in that case their interest would be subject to a depletion allowance under our decision in *Palmer* v. *Bender,* 287 U. S. 551, are questions irrelevant to the present issue. The judgment should be reversed."

The case was argued by Mr. J. Louis Monarch for the petitioner, and Mr. Harry C. Weeks for respondents.

Insurance—Subrogation of Insurer to Rights of the Insured

A common carrier by water procures insurance against its liability to its consignors for loss by marine perils. One of its ships is in collision with a ship of another carrier and the cargoes of both are damaged. Each carrier sues the other and each is adjudicated at fault and liable for half damages to ships and cargoes. The insured carrier is entitled to protection under its policy, for any liability to its cargo—consignors, notwithstanding its fault. Insurer may not escape that liability by subrogation to the rights of consignors against its own insured. Insurer's right of subrogation is limited to claims against carriers other than those insured by it.

Great Lakes Transit Corporation v. Interstate Steamship Company and Atlantic Mutual Insurance Company, et al, 81 Adv. Op. 865, 57, Sup. Ct. Rep. 915.

The questions considered in this case arose from a collision in the St. Clair River between the vessel "George D. Dixon," owned by the petitioner Great Lakes Transit Corporation, and the "Willis L. King," owned by the Interstate Steamship Company. Each owner brought suit in admiralty against the other, and the suits were consolidated. The Atlantic Mutual Insurance Company, and other underwriters, after payment to the petitioner, under policies in its favor, of the amounts of cargo damage which the petitioner had paid

to the cargo owners, intervened, seeking to recover through subrogation the amounts thus paid.

The District Court held both vessels at fault and decreed that the intervening underwriters should recover from each of the vessels and their owners a moiety of the amounts paid and payable under the policies and its decree was affirmed by the Circuit Court of Appeals. On certiorari, the ruling was reversed by the Supreme Court in an opinion by the CHIEF JUSTICE.

The petitioner contended that the insurance policies were contracts between it and the underwriters under which the petitioner was entitled to be indemnified for liability assumed under its bill of lading and tariff provisions; that the underwriters were not entitled to recover back from the petitioner what they had paid in discharge of their obligation.

The underwriters contended that their policies insured cargo and that their payments were made for cargo's benefit; that, the cargo damage having been paid by them, they were entitled by subrogation to recover the full amount of the damage against the "King"; that both vessels being at fault the "King" was entitled to contribution from the "Dixon," and that the decree to avoid circuity of action had fixed the ultimate liabilities by requiring each vessel to pay a moiety.

The cargo on the "Dixon" was carried under a uniform bill of lading under a tariff providing that the carrier should be liable for loss from perils of the sea, the applicable tariffs constituting a waiver of the saving clauses of the Harter Act, so that the carrier assumed full liability for loss or damage to the owners through marine perils.

The policies of insurance, insuring the petitioner for the account of whom it might concern, insured it against loss, if any, payable to it or its order on cargo and on the carrier's liability to others in respect of cargo from the time the carrier became responsible therefor and until its responsibility ceased. The policies further recited that the carrier taking "all the risks, perils and liabilities which by law a common carrier by land or water assumes, and also the insurance of said cargo against perils of the seas and lakes," the underwriters agreed to "indemnify and hold harmless" the petitioner against any loss to cargo from all such risks, perils, etc., "to the extent which the Assured may be held by the owners thereof, under any liability the Assured shall have assumed as common carriers, insurers or otherwise."

After a detailed recital of the provisions of the policies, the Court stated that it was unable to accept the view that the provisions cannot avail petitioner "because it did not take upon itself the insurance of cargo or assume any liability with reference thereto as an insurer," or that "its obligation as to insurance went no further than to require it to procure policies of insurance from others." Dealing with this contention, MR. CHIEF JUSTICE HUGHES said:

". . . Petitioner did more than agree to obtain marine insurance. Petitioner by its tariffs waived the provisions of the Harter Act and became itself an insurer of the cargo against marine perils. The agreement to obtain marine insurance did not detract from that undertaking. Had the underwriters been unable to respond to their contracts, petitioner would still have been liable to the cargo owners upon its own engagement. Having assumed that liability, petitioner was undoubtedly entitled to take out policies for its own protection. . . . It is a familiar rule that a common carrier 'whether liable by law or custom to the same extent as an insurer, or only for his own negligence, may, in order to protect himself against his own responsibility, as well as to secure his lien, cause the goods in his custody to be insured to their full value.' . . . 'I see nothing remarkable,' said Lord Chief Justice Russell in *Hill* v. *Scott*, L.R. 2 Q.B.D. 371, 375, 'in the shipowner insuring himself. In a case where there was a bill of lading with widely sweeping exceptions, no doubt it would be unnecessary; but where, as here, there is no bill of lading, the shipowner frequently effects an insurance in order to protect himself against liability.'

"The policies issued to petitioner explicitly afforded the protection which the petitioner was entitled to seek by virtue of the risks it had assumed. The petitioner was the 'Assured' named in the policies. Their terms contemplated that the assured as a common carrier would take upon itself full liability to the cargo owners for all damage and loss due to perils of the sea and the underwriters expressly agreed to indemnify the assured against that liability. There is no admissible construction of the policies which can eliminate or frustrate that undertaking. In its presence, if ambiguities are raised by other clauses, they must be resolved so as still to give effect to the dominant purpose which the policies clearly reveal."

In view of the purpose of the policies the Court found no basis for the contention that the underwriters were entitled to recover from the petitioner a moiety of the amounts paid to the cargo owners, and no basis was found for such contention in the admiralty rule for division of damages where both vessels are at fault in a collision. Rejecting this contention, the Court said:

"The underwriters seek to sustain the decree by invoking the doctrine of subrogation, but the equity of subrogation invests the underwriters with the rights of the assured against third persons . . . not with a right to override its own obligation to the assured. Thus, when a bill of lading provides that in case of loss the carrier, if liable therefor, shall have the full benefit of any insurance effected upon the goods, the provision limits the right of subrogation of the insurer, upon payment to the shipper, to recover over against the carrier. . . .

"Construing the policies in this instance as indemnifying the carrier against the liability which it had assumed by its bills of lading and tariffs to the cargo owners, the payments by the underwriters operated as a discharge of their obligation to the carrier and while, as the cargo owners had the benefit of the insurance, the underwriters could be subrogated to the right of the cargo owners against the "King," they could not use that right to recover over against the carrier in defiance of their own stipulation. They could recover aganst the "King" the moiety for which the "King" was liable but could not recover against the petitioner. The procedure in admiralty did not affect the substantive rights established by the policies."

The case was argued by Mr. John B. Richards for the petitioner, and by Mr. Ray M. Stanley for the respondents.

State Statutes—Regulation of Price of Milk

The Milk and Cream Act of Virginia, establishing a Commission with power to fix maximum and minimum prices of milk and cream in natural market areas of the state and providing for the licensing of distributors of such products, is a valid exercise of the police power of the state.

Highland Farms Dairy, Inc., et al. v. Agnew, et al., 81 Adv. Op. 514; 57 Sup. Ct. Rep. 549.

This opinion sustained the Milk and Cream Act of Virginia against certain constitutional objections made to it under the State and Federal Constitutions. The Act was passed in 1934 creating a Milk Commission with power to determine natural market areas in the State and to fix the minimum and maximum prices to be charged for milk and cream therein. The Com-

mission is authorized to exact licenses from distributors and the Act provides that, in the absence of a license, sales by a distributor shall be unlawful in the area. It expressly provides that none of its provisions shall apply to interstate or foreign commerce except so far as they may be made effective thereto under the federal Constitution.

The suit under review was brought to restrain the members of the Commission from enforcing the Act and regulations made under it. One of the plaintiffs, Highland Farms Dairy, Inc., referred to as Highland, has a creamery in the District of Columbia and buys milk in Virginia and Maryland for pasteurizing in the District. It sells its output of bottled milk to Luther W. High, the other plaintiff, who has retail stores in Virginia and elsewhere. The Commission created a market area described as the Arlington-Alexandria Milk Market wherein High engages in business. Minimum prices were fixed in that area in excess of the prices at which Highland had been selling to High and at which High had sold to customers, but each continued to sell at the old prices. Neither procured the required license. The Commission notified High that it would seek an injunction against him if he refused to comply with its orders but no proceedings were begun or threatened against Highland, since the Commission concluded that its transactions were in interstate commerce and beyond the reach of the Act. But Highland joined in the suit for an injunction against the Commissioners to enjoin them from enforcing the Act. A District Court of three judges, specially organized, gave judgment for the defendants. On appeal the judgment was affirmed by the Supreme Court in an opinion by MR. JUSTICE CARDOZO.

In his opinion it was observed that the appellants recognized that under *Nebbia v. New York*, 291 U. S. 502, the State has power to fix a minimum price for milk in the circumstances present. However, other objections were made to the Virginia Act which were inapplicable to the New York statute. First, the appellants contended that the Virginia Act involves an invalid delegation of legislative power. As to this contention the Court observed that such a challenge is not available under the federal Constitution so far as a state statute is concerned; and that so far as the objection is founded on the Constitution of Virginia the ruling of the State Supreme Court of Appeals sustaining the Act is sufficient.

It was urged also that the statute is invalid as applied because of a provision therein for the cancellation of prices established for a market, if cancellation is requested by a majority of the producers and distributors in the area affected. This contention was thought premature, since it did not appear that the power of cancellation had been exercised or its exercise even threatened.

A further challenge leveled at the statute was that it burdens interstate commerce. This objection likewise was found to be without merit. With respect to it MR. JUSTICE CARDOZO said:

"The statute does not lay a burden on interstate commerce. Argument to the contrary is built upon the definition of the word 'distributor' contained in section 1. We learn from that section that distributors include 'persons wherever located or operating, whether within or without the Commonwealth of Virginia, who purchase, market, or handle milk for resale as fluid milk in the Commonwealth of Virginia.' This definition, we are told, takes in the plaintiff Highland, who buys milk and sells it in interstate commerce, and does so with the expectation that upon arrival in Virginia the milk will be resold. But Highland is not subject to the provisions of the act, and so the Milk Commission has ruled. No matter what the definition of a distributor may be, sales are not affected by any restriction as to price unless made within the boundaries of a designated market area. The sections quoted in the margin point fairly to that conclusion. Highland in Washington may sell to High in Virginia, and High may buy from Highland, at any price they please. Not till the milk is resold in Virginia within a market area will the price minimum apply, and then only to the price to be charged on the resale. . . . If there could be any doubt about this as a matter of construction, the doubt would be dispelled by the administrative practice and by the warning of the statute, expressed in section 14, that operations in interstate commerce shall not be deemed to be affected. So also as to the requirement of a license expressed in section 4. High needs a license to the extent that he sells at retail to consumers in Virginia. Highland does not need one, and the Commission is not asking it to apply for one, because its business as now conducted with persons in Virginia is interstate exclusively."

The statute was also sustained against an objection that it fails to prescribe the standards which the Commission is to follow in granting or refusing to grant licenses.

MR. JUSTICE VAN DEVANTER, MR. JUSTICE MCREYNOLDS, MR. JUSTICE SUTHERLAND and MR. JUSTICE BUTLER dissented from so much of the opinion as attributes power to the state to fix minimum and maximum prices for milk and referred to the opinion of MR. JUSTICE MCREYNOLDS in *Nebbia* v. *New York*, 291 U. S. 502, for an expression of their views on that question.

The case was argued by Messrs. Philip W. Rosenfeld and Lawrence Koenigsberger for the appellants, and by Messrs. Edward H. Gibson and John S. Barbour for the appellees.

Criminal Law—Perjury—Exculpation

Retraction of false testimony previously given under oath by a witness in a proceeding duly had under federal authority does not exculpate the witness of perjury.

United States v. *Norris*, 81 Adv. Op. 497; 57 Sup. Ct. Rep. 535.

The question involved here was stated thus, in the opinion of the Court: "Does retraction neutralize false testimony previously given and exculpate the witness of perjury?"

The case arose out of an investigation by the United States Senate into campaign expenditures of candidates. The respondent, George W. Norris, had sought to file for the Republican primaries in Nebraska for an election at which Senator George W. Norris had previously filed; but the State Supreme Court had ruled that the respondent's attempt to file on July 5, 1930 came too late. Investigating the matter, the Senate subcommittee, at a hearing, inquired of respondent what financial support he had, whether he received assurance of help to finance his campaign, and whether he received any money from anybody in the campaign. In answer, the respondent testified that he had no assurance of financial support from anybody and had received no money from anybody in the campaign. Next day one Johnson testified, and respondent heard his testimony. Thereupon respondent asked to be permitted to return to the stand. On return, he then testified that he had received from Johnson $50 for his filing fee, and a $500 government bond, which he had cashed.

Later, respondent was indicted and convicted for perjury under Section 125 of the Criminal Code. The

(*Continued on page* 552)

A NEW THEORY OF CORPORATE DOMICILE FOR TAX PURPOSES

Phrase in Recent Decision of Wheeling Steel Corporation vs. Fox Which Suggests a Far-Reaching Change in the Law of State Taxing Jurisdiction—To Measure Its Significance It Is Necessary to View It in the Perspective of the Route Which the Court Has Already Traveled in Marking Such State Jurisdiction—The Point of Departure for the Discussion—Consideration of the Decisions— Four Questions of Immediate Practical Import Which Emerge from Them, etc.

By Mary Louise Ramsey
Member of the Chicago Bar

IN Wheeling Steel Corporation v. Fox,[1] Chief Justice Hughes introduced a phrase which suggests a far reaching change in the law of state taxing jurisdiction. Speaking for an undivided court, he upheld a West Virginia ad valorem property tax assessed against a foreign corporation, measured by its bank deposits and accounts receivable, including those owed by debtors in other states. Jurisdiction to tax was founded on the corporation's "commercial domicile" in West Virginia. Within a twelvemonth, the same phrase has reappeared in two other supreme court opinions[2] and in a third a similar idea was expressed in other language.[3] One of these later cases involved the taxation of intangible property, and two turned on the constitutionality of a franchise tax. The court has also denied ceritorari to review a decision of the circuit court of appeals, which, in reliance on the Wheeler case, upheld Missouri's right to tax a deposit in a New York bank belonging to a Delaware corporation which had its principal office in Missouri.[4]

In permitting this taxation of intangibles by the state of "commercial domicile" the court has talked in terms of business situs. Closer examination reveals the principle as a variant of the maxim, *mobilia sequuntur personam*. That maxim is, of course, a fiction, and as applied to corporations which transact all their business outide the chartering state, it is a fiction twice removed from reality.[5] The business situs doctrine has represented an attempt to harmonize legal formulae with the need of decentralized governmental units to derive revenue from business conducted without reference to state lines. "Commercial domicile" appears to be a retreat along a different path in the direction of the same factual supply base. To measure its significance, we must view it in the perspective of the route which the court has already travelled in marking the taxing jurisdiction of the states.

I

The point of departure for any discussion of the jurisdiction to tax intangible personalty is Justice Field's opinion in the case of the State Tax on Foreign Held Bonds.[6] The court held there that Pennsylvania could not tax interest payable to non-resident holders of bonds secured by a mortgage on railroad property in the state, because the situs of the bonds followed the domicile of their owner. This holding was soon cut down by exceptions. First, in Tappan v. Merchants' National Bank[7] the court decided that a legislature might give to national bank stock a situs independent of the owner and tax it where the bank did business. In Corry v. Baltimore[8] such taxation was permitted even against non-resident stockholders of a domestic corporation. Next, beginning with New Orleans v. Stempel,[9] the court developed the doctrine that even in the absence of legislation, intangible personalty would be recognized as having an independent tax situs when localized as a part of business transacted in the state.[10] This did not oust the jurisdiction of the domiciliary state to tax the same property. To complaints against double taxation, the court answered simply that "the Fourteenth Amendment does not prohibit double taxation."[11]

Originally, the maxim, *mobilia sequuntur personam*, applied to both tangible and intangible per-

1. 298 U. S. 193 (1936).
2. First Bank Stock Corporation v. Minnesota, 57 Sup. Ct. Rep. 677 (1937); Southern Natural Gas Corporation v. Alabama, 57 Sup. Ct. Rep. 696 (1937).
3. Atlantic Lumber Co. v. Comm'r 298 U. S. 553 (1936).
4. Smith v. Ajax Pipe Line Co., 87 Fed. (2d) 567 (1936); certiorari denied 57 Sup. Ct. Rep. 670 (1937).
5. "The resort to a fiction by the attribution of a tax situs to an intangible is only a means of symbolizing, without fully revealing, those considerations which are persuasive grounds for deciding that a particular place is appropriate for the imposition of the tax. Mobilia sequuntur personam, which has won unqualified acceptance when applied to the taxation of intangibles, . . . states a rule without disclosing the reasons for it." Stone J. in First Bank Stock Corporation v. Minnesota, supra, note 2.
6. 15 Wall. 300 (1872).
7. 19 Wall. 490 (1893).
8. 196 U. S. 466 (1905).
9. 175 U. S. 309 (1899).
10. Bristol v. Washington County, 177 U. S. 133 (1900). Assessors v. Comptoir National, 191 U. S. 388 (1903); Scottish Union v. Bowland, 196 U. S. 611 (1905); Metropolitan Life Insurance Co. v. New Orleans, 205 U. S. 395 (1907); Liverpool, etc. Ins. Co. v. Assessors, 221 U. S. 346 (1911).
11. Cream of Wheat Co. v. County of Grand Forks, 253 U. S. 325 (1920).

sonal property. However, as early as 1905, the court determined that double taxation of tangible personalty did deprive the owner of due process of law, and held that such property was taxable exclusively in the state where it was permanently located.[12] Tangible personalty which acquired no situs for taxation elsewhere remained taxable at the owner's domicile, even though never physically present at that place.[13] Two decades later, in Frick v. Pennsylvania,[14] the rule was extended to prevent inheritance taxation of tangible property located permanently outside the domiciliary state. By dictum, the court recognized that a different rule still governed jurisdiction to tax intangibles.

Four years after the Frick case, in Safe Deposit & Trust Company v. Virginia,[15] the court for the first time held invalid a tax on intangible property on the ground of double taxation. Virginia was thwarted in an attempt to tax the corpus of a trust estate held for beneficiaries in Virginia by a Maryland Trust Company, which kept the securities in its possession in Baltimore and paid taxes on them there. Following in quick succession came Farmers' Loan & Trust Company v. Minnesota,[16] wherein Minnesota was denied the right to impose an inheritance tax on the transfer of negotiable bonds issued by it and by certain of its municipalities, which bonds were kept in New York by their owner who resided and died in the latter state; Baldwin v. Missouri,[17] forbidding a tax by Missouri on the testamentary transfer by a resident of Illinois of credits for cash deposited in Missouri banks, coupon bonds of the United States, promissory notes, some of which were executed by residents of Missouri and secured by mortgages on lands there, all the securities being physically present in Missouri; Beidler v. South Carolina Tax Commission,[18] wherein a tax on the transfer of an unsecured debt owed by a South Carolina corporation to a resident of Illinois was held invalid; and First National Bank v. Maine,[19] holding that the transfer by will of stock owned by a non-resident could not be taxed by the state of incorporation.

In these last four cases the question of business situs was reserved in such terms as to lead some writers to suspect that the doctrine had been given a midnight burial.[20] While each of them involved inheritance rather than property taxation, the court made no point of the distinction. In the Farmers' Loan & Trust case, Justice McReynolds used language broad enough to assimilate intangible to tangible property for the purpose of preventing double taxation of any kind:

> "We have determined that in general intangibles may be properly taxed at the domicile of their owner, and we can find no sufficient reason for saying that they are not entitled to enjoy an immunity against taxation at more than one place similar to that accorded to tangibles."[21]

12. Union Ref. Transit Co. v. Kentucky, 199 U. S. 194 (1905).
13. Southern Pacific Co. v. Kentucky, 222 U. S. 63 (1911).
14. 268 U. S. 473 (1925).
15. 280 U. S. 83 (1929).
16. 280 U. S. 204 (1930).
17. 281 U. S. 586 (1930).
18. 282 U. S. 1 (1930).
19. 284 U. S. 312 (1932).
20. See Brown, "Multiple Taxation by the States—What is Left of It?" 48 Harvard Law Review 407, 428 (1935).
21. McReynolds, J. In Farmers' Loan & Trust Co. v. Minn. 280 U. S. 204, 212 (1930).

II

We come, then, to Wheeling Steel Corporation v. Fox.[22] Complainant, a Delaware corporation, had qualified to do business in West Virginia, Minnesota and Ohio, and had its principal manufacturing plants in the latter state. It maintained sales offices in various cities throughout the country, but its general business offices were located in Wheeling, West Virginia. The chairman of its board, its president, treasurer, secretary and chief counsel resided in that city. There its stockholders' and directors' meetings were held, and there its general books and accounting records were kept. Sales contracts were negotiated and orders taken at its various sales offices subject to approval or rejection by the officers at Wheeling. The assessed value of its tangible and real property in West Virginia was only 27.1 per cent of the assessed value of all such property owned by it. Normally, not more than twenty per cent of its bank deposits within and without the state were derived from the sale of products manufactured in the state.

Under a general statute requiring assessment of all intangibles localized within the state, the taxing officers of West Virginia had assessed all the corporation's bank deposits and accounts receivable. The company objected on the ground that the credits arising out of its manufacturing operations in Ohio were taxable only by Delaware, as the legal domicile, or by Ohio, as the business situs of such credits. The state supreme court overruled the objections, except for a deduction for the amount of intangibles which had been taxed by Ohio.

A reading of Chief Justice Hughes' opinion affirming this judgment seems to quiet all doubts as to the status of the business situs doctrine. Previous cases based on it were cited with approval, and the phrase is relied upon to justify the levy in the case at bar. But a comparison of the objective facts which were held to constitute business situs in this case with those present in previous cases reveals a significant distinction. Heretofore, the determining factors have been those tending to separate situs from the creditor, such as presence in another state of physical evidence of the debt, or of the debtor, or of the security for the debt, in combination with the operation of a continuous business.[23] Here the facts relied upon to establish situs are directly related to the creditor—its "commercial domicile" in the taxing state. Furthermore, this "commercial domicile" fixed the situs, not only for sums deposited in West Virginia banks and credits receivable for products manufactured there, but also for deposits in other states and credits receivable for the output of its Ohio plants. Heretofore, only the state of the owner's domicile,—for corporations, the chartering state,—has radiated this attraction over such credits.

Since West Virginia was not the legal domicile of the taxpayer the judicial tradition constrained the court to pour the wine of this new doctrine into an old bottle labelled "business situs." Clear thinking demands that this bottle be kept separate from that containing the old wine.

Confirmation of the recent vintage of this doctrine is found in later cases. In First Bank Stock

22. Supra, note 1.
23. See cases cited supra, note 10.

Corporation v. Minnesota,[24] a Delaware corporation was held liable to taxation by Minnesota on stock held by it in banks of North Dakota and Montana. Those states had taxed the same stock in accordance with long settled principles.[25] Again the fact that the corporation had its principal office in Minnesota, and held its stockholders' and directors' meetings and kept the stock certificates there, and from that office exercised supervision over the branch banks, was held to give it a "commercial domicile" there, and to fix the tax situs of its intangible personalty in that state. It is significant that while Justice Stone discussed business situs in denying the exclusive jurisdiction of the state of incorporation, when he came to dispose of the objection that the stock was taxable only in Montana and North Dakota, he relied on precedents which sustained the right of a domiciliary state to tax shares of stock:

"But we do not find it necessary to decide whether taxation of the shares in Montana or North Dakota is foreclosed by sustaining the Minnesota tax. . . . It is enough for present purposes that this Court has often upheld and never denied the constitutional power to tax shares of stock at the place of domicil of the owner."[26]

Even more convincing is the appearance of the phrase in a case involving a different type of tax, where business situs is irrelevant. In Southern Natural Gas Corporation v. Alabama,[27] a Delaware corporation assailed a franchise tax on the ground that it was engaged only in interstate commerce. The court upheld the tax, and again, in support of its conclusion, took note of the existence of the corporation's "commercial domicile" in the taxing state. In an earlier case, Atlantic Lumber Company v. Commissioner,[28] the court had reached the same conclusion by a similar course of reasoning:

"Although organized in Delaware, so far as the record shows appellant does not function there but in Massachusetts, to which state the exercise of its corporate powers was transferred and is confined."

III

Four questions of immediate practical import emerge from these decisions: (1) Has the law in respect of multiple taxation of intangibles been changed or clarified?; (2) How far will the new doctrine be extended?; (3) What facts will determine the location of the "commercial domicile"?; (4) Can a corporation, by any method short of complete removal, shift its "commercial domicile" from a state which imposes heavy burdens on intangibles?

The Wheeling and First Bank Stock Corporation cases leave the law regarding multi-state taxation of intangible property in as great confusion as ever. In each case the only issue was the right of the state of "commercial domicile" to levy a tax. Any expression of opinion regarding the jurisdiction of other states would have been but dictum; both Chief Justice Hughes and Justice Stone avoided direct commitment on these extraneous issues. Nevertheless, the Chief Justice's opinion is instinct with the assumption that West Virginia's right to tax could exist only in the absence of jurisdiction elsewhere. He quoted with approval Justice McReynolds' remark on double taxation in Farmers' Loan & Trust Company v. Minnesota;[29] he emphasized the lack of evidence in the record to show that any of the bank deposits could be deemed to be localized elsewhere; he disposed of the claim that Delaware had an exclusive jurisdiction by a carefully phrased negative:

"The constitutional authority of West Virginia to tax the accounts receivable and bank deposits in question cannot be denied upon the ground that they are taxable solely in Delaware."

All this seemed to confirm the court's previously indicated disposition to prevent multi-state taxation of intangibles. But Justice Stone's opinion revives all the old doubts. In the First Bank Stock Corporation case, the stocks on which the challenged tax was levied had already been taxed elsewhere. If multi-state taxation is to be banned, a decision of that case would have required a consideration of Minnesota's demand in the light of the claim asserted by the other states. Perhaps this was discussed at the conference table, but if so, the opinion does not reveal the fact. It simply says that Minnesota's power to tax is not forbidden by the fourteenth amendment; it leaves open the question as to the power of other states. But the writer of this opinion was not with the majority in the cases which condemned double inheritance taxation on intangible property. It is not surprising, therefore, that in reserving the question here, he gives the impression that, if directly attacked, the power of Montana and North Dakota might also be sustained:

"The economic advantages realized through the protection, at the place of domicil, of the ownership of rights in intangibles, the value of which is made the measure of the tax, bear a direct relationship to the distribution of burdens which the tax effects. These considerations support the taxation of intangibles at the place of domicil, at least where they are not shown to have acquired a business situs elsewhere, as a proper exercise of the power of government. Like considerations support their taxation at their business situs, for it is there that the owner in every practical sense invokes and enjoys the protection of the laws, and in consequence realizes the economic advantages of his ownership. We cannot say that there is any want of due process in the taxation of the corporate shares in Minnesota, irrespective of the extent of the control over them which the due process clause may save to the states of incorporation."

Indeed, the learned justice gives no assurance that Delaware might not be permitted to tax the same stock. Instead of outlawing double taxation, the court may be opening the door to triple taxation![30]

The fact of prime significance, however, is that the claim of the state of "commercial domicile" has been sustained against attacks from two directions. In the Wheeling case, the court said this claim

24. Supra, note 2.

25. See cases cited supra, notes 7 and 8.

26. Citing Hawley v. Malden, 232 U. S. 1, (1914); Klein v. Board of Tax Supervisors, 282 U. S. 19 (1930); Wright v. L. & N. R. Co. 195 U. S. 219 (1904); Kidd v. Alabama, 188 U. S. 730 (1903); Darnell v. Indiana, 226 U. S. 390 (1912).

27. Supra, note 2. The importance of this case as a precedent is doubtful because the court also found that certain features of the corporation's course of business constituted intrastate commerce. But the mention of "commercial domicile" as one of the bases of the decision (and the citation of the Wheeling case as the only precedent therefor) is significant for its revelation of the trend of judicial thinking.

28. Supra, note 3.

29. Supra, note 16.

30. "Appellant is to be regarded as legally domiciled in Delaware, the place of its organization, and as taxable there upon its intangibles . . . at least in the absence of activities identifying them with some other place as their 'business situs'."—First Bank Stock Corporation v. Minnesota, supra, note 2.

could not be denied on the ground that the chartering state had an exclusive jurisdiction. In the First Bank Stock case, the power was affirmed in spite of taxation by states claiming an independent situs for the choses in action. If the court does intend to prevent multi-state taxation of intangibles, apparently the state of "commercial domicile" will not be the one to suffer.

The taxation of franchises, tangible personalty and income are the most likely fields for the extension of jurisdiction based on "commercial domicile." As we have noted, that principle has already been invoked in two franchise tax cases.[31] But in those the measure of the tax was limited to property within the jurisdiction. Will the court go further and permit the state of "commercial domicile" to measure such a tax by factors which have been permitted to the state of incorporation but not to others? Will "commercial domicile" supplant legal domicile as a basis for the taxation of tangible personalty which has not established a permanent situs elsewhere? Will it support a state tax on all the income of the corporation so domiciled, though derived in part from sources outside the state?[32] The same substantive consideration based on legal protection given could be invoked in favor of such jurisdiction as for the conclusion in the cases discussed herein. But a realization that the decisions regarding intangibles are based on considerations not fully disclosed in the opinions deters us from hasty conclusions.

A partial answer to the question as to the facts which will fix the location of "commercial domicile" can be gathered from the cases which have applied that theory. It is more than a coincidence that all of them involved Delaware corporations.[33] More important is the fact that they did not depend on the proportion of tangible and real property situated in the jurisdiction,[34] but rather, on the extent of control centered in the taxing state—the location of the "seat of corporate government."[35] Residence of principal officers, the holding of stockholders' and directors' meetings, the keeping of general corporate records and accounts, the declaration or payment of dividends, and approval of contracts or orders, have been the factors emphasized in the opinions. Indeed, in the Ajax Pipe Line Case,[36] substantial control was lacking, such control being exercised by a holding company.

Until the foregoing questions are disposed of, no program for the avoidance of tax jurisdiction in states having unfavorable tax policies can be undertaken with confidence. Nevertheless, several expedients suggest themselves as possibilities. In certain cases, separate incorporation of the business done in other states might offer a way out. That would defeat the claim of the state of "commercial domicile" to tax directly the intangibles arising out of such business; usually, this would be offset by taxation of the stock of the subsidiary. If the value of the stock should, for any of various reasons, be less than the value of the intangibles held by such subsidiary, or if a large portion of that stock could be withdrawn from the jurisdiction of the parent's "commercial domicile" by distribution among nonresident stockholders of the parent, a saving in taxes might result—unless the state should assert, and the courts uphold, a right to disregard the separate corporate identities and assess a system as a whole. If the corporation sought to be taxed were itself a subsidiary, the possibility of tax avoidance through the creation of separate corporations would be much greater.

For a Delaware corporation, the most desirable arrangement, if it could be attained without too much expense or disruption of the normal course of business, would be the transfer of the "commercial domicile" to that state. Probably the state of incorporation would have a presumption in its favor, so that its jurisdiction would be recognized if any substantial portion of the functions of control were centered there. As an alternative, the corporation might shift its "commercial domicile" to a state in which it already carried on part of its business, if the taxes of the latter were less burdensome. Some corporations might be able to distribute their functions of control so evenly as to prevent any state from acquiring jurisdiction as the "commercial domicile." The question that treads on the tail of this speculation is, how much shifting of actual control would be necessary to compass any of these results? Would it be sufficint, for instance, for the Wheeling Steel Corporation to held some of its directors' meetings in Delaware (or Ohio) and to station an employee with an imposing title (perhaps a director) in that state, with responsibility for keeping a portion of the corporate records, the issuing of dividend checks, and, perhaps the giving of perfunctory approval to orders or contracts? Probably not. In the Wheeling case, the court evinced a disinclination to let "a legal fiction dominate realities" which discourages the thought that it would be deceived by any simple sleight-of-hand performance.

At the present time, any efforts in this direction would be attended with considerable risk. Instead of avoiding taxation in one state, the corporation might be inviting another state to claim the existnce of a "commercial domicile" therein. While presumably a corporation can have but one "commercial domicile," if the courts in two states should find such domicile to be located in their respective jurisdictions, the corporation might find itself in the situation of the Dorrance estate.[37] If the Supreme Court ever definitively outlaws multiple taxation of intangibles, the federal interpleader act

31. Atlantic Lumber Co. v. Comm'r. supra, note 3; Southern Natural Gas Corp. v. Alabama, supra, note 2.

32. The court has not undertaken to prevent multi-state taxation of income, nor to limit the taxation of residents to income derived within the state. See Lawrence v. Tax. Com., 286 U. S. 276 (1932), and Peo. v. Graves, 57 Sup. Ct. Rep. 466 (1937). A week after the argument in the Wheeling case, the court denied certiorari to review a decision of the Supreme Court of Wisconsin (219 Wisc. 293) holding invalid a statute declaring a foreign corporation which did its "principal business" in the state to be taxable as a resident for income tax purposes. (Wisc. Stat. Sec. 71.02 (3) (e)—Wisc. Tax Com. v. Newport Co. 297 U. S. 720 (1936). The state court based its conclusion on the fourteenth amendment. A distinction might be drawn between "commercial domicile" and the transaction of "principal business" within a state.

33. Including Smith v. Ajax Pipe Line Co., supra, note 4.

34. Compare Virginia v. Imperial Coal Sales Co., 293 U. S. 15 (1934) where the court said it could not perceive "any sound reason for holding that the owner must have real estate or tangible property within the State in order to subject its intangible property within the State to taxation."

35. Wheeling Steel Corporation v. Fox, 298 U. S. 193, 212, (1936).

36. Supra, note 4.

37. Dorrance v. Martin, 184 Atl. 743, certiorari denied, 56 Sup. Ct. Rep. 949, 957 (1936).

might be available to prevent such result,[38] but that possibility is as yet too tenuous to be relied upon.

In the Wheeling case and its successors, the Supreme Court has again given evidence of its creative statemanship. And it is characteristic of creative judicial opinions to raise many more questions than they answer.[39]

38. In Worcester County Trust Co. v. Long, 14 Fed. Supp. 754 (1936) interpleader was allowed to determine what state had the right to levy an inheritance tax. This was reversed by the Circuit Court of Appeals (First Circuit) in Riley v. Worcester County Trust Co., 89 F. (2d) 59 (1937). On May 24, 1937, the Supreme Court granted certiorari to review the latter decision. See Chafee, "Federal Interpleader Act of 1936"—45 Yale Law Journal, 1161, 1170 (1936).

39. In imagination, one can see this doctrine encroaching upon other areas of the law. The jurisdiction of federal courts, for instance. While the court is not likely to overrule the presumption which fixes the citizenship of a corporation for purposes of such jurisdiction in the state of incorporation, it is conceivable that it might modify its attitude on unconstitutional conditions to the extent of permitting the state of "commercial domicile" to require waiver of the right to remove cases to the federal courts. If the doctrine becomes familiar through application in tax cases, judges may be encouraged to take a more liberal view of the jurisdiction of the courts, and even of the legislature, of the state of "commercial domicile" to deal with the so-called "internal affairs" of foreign corporations. Compare Rogers v. Guaranty Trust Co., 288 U. S. 123 (1933).

CURRENT LEGAL LITERATURE

A Department Devoted to Recent Books in Law and Neighboring Fields and to Brief Mention of Interesting and Significant Contributions Appearing in the Current Legal Periodicals

Among Recent Books

SUGAR: A Case Study of Government Control, by John E. Dalton. 1937. New York: The Macmillan Company. Pp. 311. Here the ex-chief of the Sugar Section of the AAA presents the record of a leading attempt of the New Deal at "planning" of production—an attempt which, despite the invalidation of the AAA, was extended through 1937 by the Jones-O'Mahoney Sugar Resolution of June 19, 1936. This last is on the theory, suggests the author, that a "limitation of the marketing of sugar in interstate and foreign commerce is based upon constitutional powers different from those used in the imposition of processing taxes and the control of agricultural production."

Prior to the AAA decision, the marketing quotas for the various areas supplying the American market had been used as the basis for constructing production quotas. From the marketing quota for a given area, the individual processors of the area received marketing allotments; and from a corresponding production quota, the various districts served by a processor, and then the various farmers within the district, were given production allotments. At the end of the year, compliance with the adjustment contract was verifiable from the records of the processor as well as those of the farmer.

Clearly this scheme exhibits a peculiarly intimate relation between growers and processors. Many sugar growers sell year after year to the same processors, who have contracted for the crop in advance, and exercise a degree of control even over the growing. Because of such intimacy of relationship the Administration felt itself able to rely heavily on the local industrial and agricultural agencies for administrative details. The same was true of the processors who were themselves large cane-growers; since they received both the benefit-payments on producer contracts and the benefits of higher prices from the quota system, and since they were, to some extent, competitors of the small independent producers whose output they absorbed as processors, they were naturally willing to assist the Administration by restricting the grinding of the independents' cane to the latter's quotas, and reporting the grindings to the Administration.

Facts such as these figure significantly in the author's argument that the general feasibility of government interference in the competitive economy cannot be confidently inferred from the substantial success of the sugar effort. Additional evidence of the "special" status of sugar is cited, including the observation that, in the planning process, unpredictable factors such as drought or plant-disease do not loom large, in view of the widely-distributed area of supply for the American market, and the demonstrated practicality of storage of reserves.

Thus consciously restricting himself to a "case study" the author cautions that generalizations on economic planning be held in abeyance until corresponding studies have been made in other fields, and until there exists appropriate Federal machinery "to evaluate the claims for assistance that are constantly advanced by agricultural, business and labor groups." Indeed, "the public interest, in many instances, is likely to be served by a withdrawal of government intervention." As between competing types of intervention for sugar, however, the author feels the AAA decision has produced a control scheme inferior to the former one. "The invalidation of the direct bounty system, under which payments in varying amounts can be made to producers roughly in accordance with their needs, will add to, not reduce, the burden upon the consuming public." Raising the income of domestic producers solely by raising prices through the quota mechanism is a more expensive alternative, since the price is raised "high enough to protect the high-cost domestic producers," and the low-cost off-shore areas receive the

same protection, thus receiving "a very lucrative income."

Apart from such general points of view, the author confines himself to a largely factual survey of the field of sugar control, valuable chiefly for its illumination of some of the practical problems and procedures in administrative planning, and its analysis of the various "interests" in the areas supplying the American market. One additional medium of government control—the anti-trust laws—might well have been explored, since the recent prosecution of the Sugar Institute revealed, and changed, some of the fundamental pricing and marketing policies of the domestic refiners.

The book has added significance in the context of this year's international conference to plan for sugar on a world basis.

SAMUEL MERMIN.

Washington, D. C.

Federal Taxes on Estates, Trusts and Gifts 1936-1937, by Robert H. Montgomery and Roswell Magill. 1936. New York: The Ronald Press Company. Pp. x, 526.—This is a day when the draftsman of a will or a trust must be on intimate terms not only with the Rule against Perpetuities and the other fine mysteries of the conveyancer, but with a substantial portion of his state and federal tax systems as well. Taxes have reached the point where Government has not only become a silent partner sharing substantially in the profits from Everyman's business, but a "laughing heir" who will laugh very heartily indeed at the unwary testator or trustor who disposes of his estate without carefully canvassing the tax aspects of his particular situation.

The federal income, estate and gift taxes are designed so to complement each other that in seeking to avoid one tax it is easy to become embroiled with any other. Any intelligent plan of tax avoidance connected with the disposition of an estate must carefully weigh all three taxes. In Federal Taxes on Estates, Trusts and Gifts for the years 1935 and 1936, Messrs. Montgomery and Magill combined in a single volume the federal estate tax, the federal gift tax and the pertinent portions of the income tax relating to trusts and estates. The current edition of their work not only brings it abreast of contemporary developments, but adds a new and exceedingly valuable chapter on "Planning the Distribution of an Estate." With the dramatic directness of concrete figures, the authors show the striking economies which can be effected by intelligent planning, and they drive home forcefully the vital importance of considering all three taxes together.

The style and book closely parallel Mr. Montgomery's Federal Tax and Federal Income Tax Handbooks. The statutes, relevant rulings and regulations, and summaries of the Board of Tax Appeals and court decisions, are set forth in detail with the critical and expository comment of the authors. The statutes are also reprinted in an appendix. The authors' work is sane and accurate with a mild bias in favor of the taxpayer, which, however, never carries them to the position of stating a controversial point as anything but controverted. The lawyer, the trust officer and, perhaps, even the "reasonably prudent" taxpayer will find *Federal Taxes on Estates, Trusts and Gifts* a valuable addition to their libraries.

CHARLES L. B. LOWNDES.
Law School, Duke University.

Action for Slander, by Mary Borden. 1937. New York and London: Harper & Brothers. Pp. 305.—This novel by a former Chicagoan of well-known family, now the wife of an English Brigadier, has a special appeal to lawyers because it rests on the trial of a suit for slander brought by an English army officer who had been accused by a brother officer of cheating at a social game of cards. For one thing, aside from the fascinating grip of the story, the American lawyer will be intrigued by the revealing differences between the English practice and our own in the matter of evidence—and indeed in the entire trial procedure. It is stated on the jacket that the author found "greater drama in English courts than American, despite the freer methods of American counsel." Undoubtedly there is "greater drama" to be found in the English courts. But, one hastens to add, it is the "freer methods" not of the American, but of the English courts, in trial procedure, that furnish the greater scope for dramatic effect. The American practitioner is forced, by our slavish adherence to the rules of evidence, to reduce his trials largely to a constant and bitter technical bickering over the admission or exclusion of proof. An English trial, on the other hand, is scarcely ever interrupted by court or counsel as to the propriety of question or answer. Witnesses are shamelessly (according to our concepts) led by counsel very far afield, and opinion stalks freely as fact. Indeed what a witness thinks or believes seems to throw essential highlights on the case. In this book, almost everything (except the clever practical exposé of the impossibility of defendant's story of the cheating) could have been excluded by a skilled American practitioner in the first instance, if not finally. And yet the book reports accurately an English trial. The English go at a trial of this kind more as a metaphysical battle of wits—not as a game to see what objective facts can be excluded, but as a kind of psychological sword-play leading round to a more or less inevitable logical conclusion.

This reviewer has always felt that the greatest drag on fact-finding in our legal procedure has been our parrot-like insistence on the out-worn rules of evidence. Practically everything should go in for what it is worth. There can be no real progress in this regard until we take further leaves from the practice of our law-mother.

Of course, as in this book, subjective hair-splitting sometimes makes the average juror wonder what it is all about. But in the long run, the truth is thus more likely to emerge, than from the suppression of essential evidence on account of its violation of some ancient rule.

In the novel, which is unusually well written, there is an underplot—a matter of sex jealousy and chivalry—that accounts for the venom of the slanderers, as well as the otherwise inconceivable patience with which the victim waited and suffered for nearly a year before bringing action. The reader knows this, and the jury does not. Yet neither is sure of the truth of the charge until the end, for the introspective nature of much of the testimony seems at times to say that the plaintiff actually did cheat

in the poker game. The actual experiment with cards tried before the jury finally convinces everyone of the truth, and the case is settled then and there.

The book skilfully weaves into the true atmosphere of the trial the clever opening speeches of counsel (so widely different in method and scope from our own), the subtle interrogation of witnesses, the side comment of some jurors, and of friends of the plaintiff, and of the author herself (though not obtrusively), giving a general effect that holds the close attention of the reader, whether lawyer or layman.

Much credit is due to the author for the clearness of her literary style, her remarkably keen intelligence, and her surprising legal technique. Lawyers will find it a pleasure to read this book, so singularly free from the technical blunders that mar so many novels and plays for members of our profession.

GEORGE PACKARD.

Chicago.

Prisons and Beyond, by Sanford Bates. 1936. New York: The Macmillan Co. Pp. 334.—The treatment of the criminal is receiving more and more popular attention both in this country and abroad. Here is a timely, interesting and forward-looking discussion of it. The author, while disclaiming the title "penologist," is well qualified by long and successful experience in prison administration to speak with authority.

The content and spirit of this book are indicated in this quotation taken from it:

> "I have tried to give a picture of the jails and prisons of America, with their shortcomings and inadequacies, and their relationship to the problem of crime. I have endeavored to show why prisoners riot, what is the basis for the accepted conclusion that prisons have failed, why men should work in prisons, and to what extent we may call upon the new scientific discoveries to help us in our work. I have described at some length the operation of the Federal prison system which, due to provision by Congress of sufficient appropriations, is becoming well equipped and adequately staffed. I have pointed out some of the well-nigh insoluble problems that face the prison warden, commented upon the difficult character of the persons with whom he has to deal and ended with a plea for a more tolerant understanding of the final problem of parole supervision."

This is a practical book on how to run prisons. It describes what is being done in different parts of the country, especially in the Federal prisons, to develop a new kind of prison and a more intelligent type of prison administration, but there is enough historical information about prisons in the past and plenty of factual data about the evils and shortcomings of our present-day system to bring out clearly the superiority of modern ideas and methods.

Clearly, Mr. Bates agrees with the conclusion of the Wickersham Commission, that prisons have largely failed to reform their inmates and so have failed to protect society, but this he appears to think is not inevitable. It is due to the many evils and shortcomings of our prisons, which he describes at length; for example, the inadequate, untrained or political personnel, the prevailing lack of suitable employment, improper classification of prisons, lack of books and educational facilities, lack of medical staff or even sanitary conditions. Assuming that prisons will continue to be necessary as disciplinary agencies, Mr. Bates believes, and in his work with the Federal prisons has gone far in demonstrating, that all these evils can be removed. His philosophy of prison reform is well summed up in the following:

> "What will be the result of new and more adequate buildings, decent living conditions, improved diet, better qualified prison guards and efforts to educate the individual? Will it remove the fear of punishment? Can we improve our prisons and yet deter the potential criminal? I believe we can. While our new system is to be built around the concept that all its prisoners must be returned to society, and that society is not protected unless they are returned more efficient, more honest, and less criminal than when they went in, at the same time such punishment need not lose its deterrent value."

A chapter is devoted to the county jails, the most important penal institutions because of their large number and rapid turnover of young as well as old offenders. There are about 3,100 county jails or city workhouses in the country. Very few of them are even decently clean, many of them are crowded. disease-breeding places, where there is enforced idleness and no reformative element. Eventually the local jails should be superseded by a state controlled system, but in the meantime Mr. Bates would have the number of persons committed to jails decreased to a minimum and greatly reduce the prevalent evil of long periods of jail detention awaiting trial.

Prison riots, which in late years have become more frequent and more costly, are shown in this book to be almost always the result of bad conditions: overcrowding, idleness, and above all unfit prison employes. These recurring evils can be prevented. There are prisons in the country which have never had a disturbance of this kind.

Prison labor, still an acute problem today, is treated realistically. It is a social problem. Indeed, this book makes very clear the fact that prisons and prisoners can never be cut off from the society that exists outside. The state-use plan of prison labor is advocated and is shown to have succeeded in Federal prisons. Prisoners must work, but so as to avoid an unfair advantage over free labor. State-use, public works and vocational training must be substituted for the contract system, exploitation and unfair competition.

Much emphasis is placed on the importance of an improved personnel. The prison warden has one of the most important and difficult of jobs. All prison employes are important, down to and including the guards. The Federal prison system has set an example to the states in providing training for prison guards. This system has the inestimable advantage of having its entire personnel, except wardens and chaplains, appointed under the merit system.

One of the strongest advocates for an effective parole system, Mr. Bates presents a convincing array of facts to prove that parole, properly administered, is a safeguard and protection to society. He

says significantly that a better understanding of the real purpose of parole would be gained if we could speak of prisoners being *subjected* to parole rather than *granted* parole. "Which," he asks, "is the safer method of discharge for convicts, of all classes and all degrees of criminality and all types of personalities: to be released from prison without let or hindrance, lacking the guidance or restraint of personal or official supervision, or to be returned to the community under close control?" The parole system has been shown to be highly successful in the Federal system. In 1935 all but 9% of prisoners released on parole completed their terms without default. Parole is likewise successful in well-administered state systems. There is much misuse of the system, but still greater misuse of the term "parole," it often being confounded with pardon and other methods of release without proper selection or supervision.

A brief chapter is devoted to probation, that system which offers the judge an alternative to imprisonment more effective as well as more humane for that large class of offenders who will respond to supervised discipline in the community, adapted to meet the needs of the offender and to help him to help himself. This system, when administered with a proper personnel and with due regard to a selection of the cases, is fully endorsed. The Federal government has shown its belief in its efficiency and economy by increasing the number of probation officers as the use of the system has increased in the United States district courts each year.

After laying down this book one feels that there is hardly anyone who would not profit by reading it. It has valuable information and suggestions for every lawyer and correctional worker. It is also valuable reading for the lay public. The book is made more interesting by well selected photographs and apt quotations in the chapter headings.

CHARLES L. CHUTE,
Executive Director, National Probation Association.

The Gold Clause, by Arpad Plesch. Vol. II, 2nd ed. 1936. London: Stevens & Sons, Ltd., 1936. Pp. vii, 106.—The author or editor of this little book is obviously interested in proving—where that is possible from decided cases—or of ensuring where doubt still exists,—that "the gold clause in contracts be construed as a measurement of value clause, because to hold otherwise would mean not to construe but to destroy it." Or as Chief Justice Hughes holds in *Norman's Case*—"these clauses were intended to afford a definite standard or measure of value, and thus to protect against a depreciation of the currency and against the discharge of the obligation by the payment of lesser value than that prescribed."

In support of this view Mr. Plesch submits the relevant sections from twenty important cases decided in ten leading commercial countries. This view will of course meet with the general approval, in the present circumstances at any rate, of all those who are creditors; and in a period of stability, when goods, services and wages are relatively stable in terms of gold, there is much to be said for this view or policy. In times of crisis, however, when these goods, services and wages are greatly depreciated in terms of gold, it imposes an almost intolerable burden upon the debtor class. In strict law, in the sense that Shylock knew law, this view is good law and these cases properly decided, but the author would have made a more valuable contribution to the student of law—and to law itself—had he presented as well the arguments,—and the cases where these exist,—to the contrary effect. For the practising lawyer, who may be confronted with similar problems, this is an admirable little collection and the author is to be commended for the useful work he has done in collecting, translating and editing it.

NORMAN MACKENZIE.
University of Toronto.

Historical and Comparative Notes on the First Origin of Specific Performance, by Dr. Michele G. De Rossi (Reprinted from *The Juridical Review*, June 1936). Edinburgh: W. Green and Son, Ltd. 1936. Pp. 20.—Those who have read this study on its first appearance will be glad to possess it in separate form, while new readers will welcome it as a solid contribution to legal history such as we would expect from the learned author of *Il "Contempt of Court" nel Diritto Inglese*, which appeared in 1934. Dr. De Rossi has acquired an established position as an historian of English law to which the discussion under review will distinctly add. His main theme is to extend the position of Sir Edward Fry, Proudfoot, Pollock and Maitland, Professor Hazeltine, R. M. Henry, and others against the claim that specific performance was a clerical invention which passed into English law through the canon law. The author argues with learning and authority that "to the canon law only is due the merit of having given new strength to the analogous common principles known and practiced in Germany and England before the Reception of the Canon law in these countries" (at p. 19). The thesis is maintained with clarity and abundance of authority. Dr. De Rossi takes a secure place among foreign scholars who are at present doing so much to elucidate the problems—past and present—of English law.

W. P. M. KENNEDY.
University of Toronto.

Rapport Sur L'Activité De L'Institute International De Rome Pour L'Unification Du Droit Privé, 1935-36. Pp. 12.—Made possible in 1926 through the assurance of an annual grant from the Italian government, the International Institute of Rome for the Unification of Private Law has a number of substantial accomplishments to its credit. Working under the direction of the League of Nations, the Institute already has submited detailed projects in regard to an international law of sales, and in regard to a uniform law concerning the civil responsibility of inn-keepers. Replies to these projects are being awaited from the various member states of the League.

The report of the Institute for 1935-1936 reveals also that the preliminary draft of an international law on arbitration has been sent for comment to interested bodies throughout the world, and that a study of the civil responsibility of motorists is well advanced. Among other matters that are being given consideration may be mentioned the laws applying to laborers in intellectual fields and maintenance obligations, while studies in contemplation include clearing, exchanges, irrevocable credits, and contracts of reassurance.

It is interesting to note that in connection with the draft report of a study of contracts concluded between persons not in the presence of each other a number of vexed questions have been given careful attention. The

approval of all the members of the committee has been secured, for instance, to a proposed solution of the problem of the time and place of the formation of the contract. In accordance with this solution the time and place of the sending of the acceptance are decisive except in cases where the offeror has stipulated otherwise, where the offeree uses an unauthorized mode of communication, or where a specific usage or course of trade is in question. This solution would do much to relieve the present uncertainty on the point in France, but would necessitate a reversal of the present German view that no declaration of the will is effective until received.

The potential importance of the work being done by the Institute cannot be emphasized too strongly. Modern methods of transportation and communication have brought the far countries of the earth closer together than ever before. It is high time that their laws in matters of common concern began to follow suit. Something, to be sure, has been achieved, as with bills of exchange and with certain aspects of bills of lading, but all too much remains to do. Conflicts breed confusion, and confusion impedes progress.

PHILIP W. THAYER.

Harvard University.

State Law Index: An Index and Digest to the Legislation of the States of the United States enacted during the biennium 1933-1934. No. 5. Washington: Government Printing Office. 1936. Pp. viii, 1126.—Earlier volumes of this series were commented upon by the present reviewer in the issue of this Journal for January, 1933. This volume, like its predecessors, was compiled by the Legislative Reference Service of the Library of Congress under the direction of Miss Margaret W. Stewart, and its form varies little from that of earlier volumes. Those who find it desirable to follow state legislation are familiar with the Reviews of Legislation published by the New York State Library for a number of years and discontinued with the year 1908. For many years no publication was available which gave full information on state legislation. Congress in 1927 provided for this biennial index and digest, and the support of the American Bar Association may have been to some extent a factor contributing to its initiation. The biennial volumes have proved of distinct value, although necessary delay in preparation and publication prevents their being of assistance with respect to current legislation. The magnitude of the editor's task is indicated by the fact that the present volume covers 128 state legislative sessions, and involved the examination of 23,465 acts.

In a review of prior volumes it was suggested that state judicial decisions on constitutional issues should be listed, and that it would be helpful to have tables indicating the votes cast upon constitutional amendments and upon state-wide referenda. In the present volume "a new feature has been added of a list of court cases interpreting the acts which have been included in the digest". This list indicates the cases involving the constitutionality of state statutes, and gives the Reporter citation to each case. It would be somewhat more helpful if the names of cases were also given and if the editor had analyzed the results of such cases, somewhat as was done in the earlier reviews of state legislation published by the New York State Library.

WALTER F. DODD.

Chicago.

Social Treatment in Probation and Delinquency; Treatise and Casebook for Court Workers, Probation Officers, and Other Child Welfare Workers, by Pauline V. Young. Foreword by Roscoe Pound. Introduction by Justin Miller. 1937. New York: McGraw-Hill Book Co. Pp. 646.—Dedicated to Robert H. Scott, Judge of the Los Angeles County Court, this book contains much of interest to lawyers. In its systematic approach to the problems of delinquency it helps to clarify the struggle that has been going on between legalistic thinkers and social workers in the thirty-five years since the first juvenile courts were established. One of the outstanding contributions of the juvenile court movement has been the development of children's clinics associated with the courts for the scientific study of personality problems,—their purpose to supply the judge with knowledge of the individual confronting him and to offer suggestions for his treatment. Modes of exercising the authority of the state as *parens patriae* have been tentative; nevertheless, as H. H. Lou says, the law is a living social institution which can incorporate and utilize the ideas and methods developed by the modern social sciences. The socialized procedure of the juvenile court is sharply distinguished from that of the criminal court, treatment in extension of the principles of guardianship by an equity court being the keynote, in place of impersonal retribution and deterrence. Of especial significance is the section on Legal Aspects of Probation, Individualization of Justice, Socialization of Court Procedure, which has been edited by Sheldon D. Elliot, Director of the Southern California Legal Aid Clinic of Los Angeles, and which includes chapters on the report to the court, the juvenile court hearing, the juvenile court from the point of view of administrative law, and the role of the police in the work with delinquent youth.

Other sections are: The Social Case Study of Unadjusted Youth and Parents, Dynamics of Social Therapy in the Work with Unadjusted Youth and Parents, and Utilization of Community Resources in the Work of Unadjusted Youth and Parents. Case histories are given in illustration of principles of therapy, which show how far social work may be effective in adjustment of delinquents. Following Cyril Burt, cases are viewed not as mere sums of contemporary constituents but as the product of converging social forces operating cumulatively throughout life. Social workers are advised to become community- rather than agency-minded and to be cognizant of the limitations of their techniques in solving the intricate patterns of delinquency. The sociological approach through community organization is emphasized rather than the present attention to the individual. An excellent bibliography is appended to each chapter for those who desire to enter upon more comprehensive exploration. Dr. Young brings to her study the benefit of her practical experience in the Boy's Work Survey and the County Probation Department of Los Angeles and in the New York Boy Scout Survey. Her book is a scholarly contribution to the literature of juvenile delinquency.

JAMES HARGAN.

New York City.

Unauthorized Practice Decisions. Edited and compiled by George E. Brand of the Detroit Bar. 1937. Detroit: The Detroit Bar Association. Pp. xix, 838.—First impression on examining this ponderous tome is one of wonderment at how such a massive collection of cases could be gathered together, digested, arranged and indexed by a busy practicing lawyer. The labor involved has been colossal and only those of us who know the indefatigable George Brand will be able to comprehend how this was accomplished. To many, the next reaction will be one of astonishment at the extent of the field which a complete review of unauthorized practice covers and the number of decided cases which deal with the subject.

Two hundred and thirty-seven cases are digested in Mr. Brand's book. They cover practice by abstract and title companies; adjusters; collection agencies; corporations; intermediaries and intermeddlers; judges, court clerks, officers, etc.; banks; and trust companies. A partial list of subjects involved includes bankruptcy and liquidation, boards and commissions, corporate litigation in person or by lay agent, deeds, contracts, etc., defective legal work by laymen, justice and police courts, landlord proceedings, organization of corporations, probate court, services re taxes, simulation of process, simple and complex documents, wills and trust agreements. The procedural side of unauthorized practice is also fully developed, the remedies used to combat it including contempt, criminal prosecution, declaratory judgment, disciplinary proceedings, failure of civil action where unauthorized practice has been employed, injunction, judicial investigations, prohibition and quo warranto.

From another point of view, this book is also remarkable. It is a visible demonstration of the progress which has been made by the organized bar in protecting the public from a class and type of practice which is not in the public interest. Here is a new field of litigation. The cases involving unauthorized practice date mostly from the last seven years, although many cases in the book such as In re Day from Illinois, In re Duncan from South Carolina and In re Morse from Vermont indicate that the courts for many years have been preparing the way for controlling the practice of law by laymen and lay agencies and have done this by defining in broad terms the power of the judiciary over the practice of law.

All the famous milestones are here and in practically every one of these decisions may be read the inspiring story of the sweat and self-sacrifice of public-spirited lawyers and the gathering strength and effectiveness of bar associations. There is the Stockyards Bank case from Illinois, the Opinion of the Justices in Massachusetts setting forth the court's power over bar admission and the later opinion declaring the inherent power of the court as to unauthorized practice, the Richards case in Missouri, Fitchette v. Taylor in Minnesota, the automobile association cases from Rhode Island and Illinois, and now the collection agency cases from Virginia, Missouri, Kansas and Massachusetts and the lay adjuster cases from Louisiana, Illinois and Missouri. Here in the printed pages of the decisions of a score of our courts of last resort is written the struggle of our bar to preserve its franchise for those who have shown themselves qualified to employ it and who are subject to the control, the rules and the code of ethics of the legal profession. The widening of the field of bar activity to suppress unauthorized practice may be read in the many recent decisions dealing with collection agencies, lay adjusters, appearances before administrative boards, and infringements by realtors and accountants. On the other hand, it would seem from the book that litigation with banks and trust companies is on the wane, that problem having been previously dealt with in decisive fashion.

From the above it is evident that the book is of great interest to a student of this subject, in the opinion of this reviewer. Also, the book is very valuable, in fact, in my judgment it is indispensable to the person or committee engaged in preventing unauthorized practice. The digesting has been well done and the important parts of all recent decisions are included verbatim. Many unreported decisions are made available and the voluminous indexes make the volume into an up-to-date and authoritative text book. The cases are indexed alphabetically, then by states, then under subject headings, and finally there is a general index. The thoroughness with which the indexing has been done may be judged by the fact that the recently decided Dudley case, an important collection agency decision in Missouri, appears in the index in no less than ten places. This complete and thorough classification of all the cases digested adds greatly to the value of the book. Unauthorized Practice Decisions is recommended without reservation to all those who are interested and concerned with this field of the law.

STANLEY B. HOUCK.

Review of Recent Supreme Court Decisions

(*Continued from page* 542)

District Court at the trial refused instructions to the effect that the defendant was not guilty if he corrected any false statements while the matter was pending before the subcommittee. The Circuit Court of Appeals reversed for refusal to give such instructions. On certiorari its decision was reversed by the Supreme Court in an opinion by Mr. Justice Roberts.

After brief discussion of several minor points, the opinion deals with the principal question presented, and states:

"... We hold the District Judge was right in refusing to charge as requested by the respondent and the judgment should not have been reversed on account of his failure so to do. The respondent admitted he gave intentionally false testimony on September 22nd. His recantation on the following day cannot alter this fact. He would have us hold that so long as the cause or proceeding in which false testmony is given is not closed there remains a *locus poenitentiae* of which he was entitled to and did avail himself. The implications and results of such a doctrine prove its unsoundness. Perjury is an obstruction of justice; its perpetration well may affect the dearest concerns of the parties before a tribunal. Deliberate material falsification under oath constitutes the crime of perjury and the crime is complete when a witness' statement has once been made. It is argued that to allow retraction of the perjured testmony promotes the discovery of the truth and, if made before the proceeding is concluded, can do no harm to the parties. The argument overlooks the tendency of such a view to encourage false swearing in the belief that if the falsity be not discovered before the end of the hearing it will have its intended effect but, if discovered, the witness may purge himself of crime by resuming his role as witness and substituting the truth for his previous falsehood. It ignores the fact that the oath administered to the witness calls on him freely to disclose the truth in the first instance and not to put the court and the parties to the disadvantage, hindrance, and delay of ultimately extracting the truth by cross examination, by extraneous investigation or other collateral means."

The case was argued by Mr. Charles E. Wyzanski, Jr., for the petitioner, and by Mr. William E. Shuman for the respondent.

AUTOMOBILE INSURANCE AND THE DECLARATORY JUDGMENT

Automobile Insurance Companies Have Looked with Longing upon Increasing Use of Declaratory Judgments in Last Few Years—Technical Issues Which May Arise as to Claims Under Policy—Attitude of State Courts—The Federal Act and Certain Federal Court Decisions—Important Elements in Procedure, etc.

By John A. Appleman
*Member of Bloomington, Ill., Bar**

IN the last few years automobile insurance companies have looked with longing upon the increasing use of declaratory judgments. In a great many cases the question arises as to whether or not there is actually in force and effect a policy of insurance. Perhaps on the basis of fraudulent representation it is contended that a policy never came into force, or, rather, was void from its inception. Or because of non-payment of premiums or a breach of some condition precedent the insurer insists that a policy originally valid has become void or has lapsed. Also, the use made of the automobile may be one prohibited by the terms of the policy. Must the insurer under such situations actually defend a personal injury suit or may it disclaim liability? Can it resort to an action of declaratory judgment for this determination?

The writer has classified the more common policy defenses, so called, under the following heads—which includes only those more commonly raised and those of major importance.

1. Misrepresentations as to incumbrances, age and model, use, ownership, location, other insurance, previous cancellation, or other matters.
2. While the automobile is rented or leased, or used to carry persons for a consideration.
3. For any liability assumed by contract or agreement.
4. For any accident occurring after a transfer during the policy period without insurer's written consent.
5. While the automobile is used in the business of testing or demonstrating.
6. While towing any trailer unless such use is specifically declared and a premium paid therefor.
7. For injuries or death sustained by any employee of insured other than a domestic servant, or for any liability imposed by any Workmen's Compensation or Employer's liability law.
8. While operated by any person in violation of law as to age, or under the age of 14 years in any event.
9. While operated in any prearranged race or competitive speed test.
10. While used in violation of the commercial clause if that be the disclosed intent; or in violation of the business and pleasure clause if that be the disclosed purpose.
11. While used outside of the territory named—e. g., in Mexico or Alaska.
12. If a third person be operating said automobile without the named insured's permission.
13. If such automobile be operated by any repair shop, service station, or other prohibited agency.
14. For any loss where there is other valid and collectible insurance.
15. Where the policy has lapsed or been cancelled for non-payment of premiums.
16. Where the policy has lapsed or been cancelled for reason of named insured's death.
17. Where an attempt to transfer insurance to new insured after death of insured or sale of insured property has been ineffectively made.
18. Where fraud or collusion, or refusal to cooperate, is present.
19. Where no proper notice has been given or suit papers and processes have not been forwarded.
20. For other breaches of conditions precedent or exclusions.

The number of these serves to illustrate what technical legal issues may be raised. None of them is free from difficulty, and often several of them are found to be present at the same time. Under the terms of a liability policy the insurer is obligated not only to pay any judgment secured against the policyholder, but also to defend any litigation brought against the named insured or any additional insured.[1] Assuming that claims are presented and suits commenced against the insured and the insurer has what it believes to be a bona fide policy defense, what courses of action may it follow? It may disclaim liability and step out of the picture until garnisheed after recovery against the insured. In this event it runs the risk of collusion between the plaintiff and insured, of a judgment by default, or of an inadequate and poorly organized defense by insured and inferior counsel. Insurer may choose to defend under a reservation of rights agreement. By so doing, it may avoid the dangers above set forth, but it must incur hundreds and perhaps thousands of dollars in court costs, attorneys' fee, and miscellaneous items involved in either the trial or appeal of a lawsuit. This expenditure is unwarranted and unjustifiable where the policy defense proves to be valid. As a matter of fact, it seems distinctly contrary to public policy to permit the disbursement of funds

*Mr. Appleman is a member of the Legal Department of the State Farm Mutual Automobile Insurance Co.

1. The standard policy is, in this respect, worded as follows: "It is further agreed that as respects insurance afforded by this policy (under coverages A and B) the company shall (a) Defend in his name and behalf any suit against the insured alleging such injury or destruction and seeking damages on account thereof, even if such suit is groundless, false or fraudulent; but the company shall have the right to make such investigation, negotiation and settlement of any claim or suit as may be deemed expedient by the company."

held in trust for all policyholders for the purpose of defending a law suit brought against one who, in reality, either never became a bona fide policyholder or lost his right to claim protection because of his refusal to fulfill the policy terms and conditions. Such disbursements weaken the financial position of an insurance company and result in no gain to the injured third person—since a valid defense will develop in the garnishment action.

Has this situation been altered in any respects by the declaratory judgment acts? In order to adequately discuss this question, it might be well to glance at the purpose of this form of action. As a matter of fact, few attorneys have ever drafted a bill of this nature or had occasion to examine one, but for the purpose of abbreviating our discussion, the writer must assume that the history and general nature of declaratory judgments are fairly familiar to the reader. It is impossible to treat this adequately in a short article.

A declaratory judgment is similar to any other action in its essential characteristics except that it does not pray performance or execution by the opposing party. The usual procedural and substantive conditions must be present—as, for example, jurisdiction over parties and subject matter, capacity of the parties to sue and be sued, actual controversy, proper parties plaintiff and defendant, normal judicial procedure, etc. While some courts have called such actions proceedings in law and others proceedings in equity, the majority of attorneys and courts appear to consider them in the latter category, which they most resemble. There is nothing inherently unique or terrifying about the pleadings if all requisites are observed. This will be treated in more detail later.

Declaratory Judgment statutes are now found in 38 states and the District of Columbia,[1a] of which approximatey 22 are based upon the Uniform Declaratory Judgments Act.[2] In 1934 a Federal Declaratory Judgments Act became law,[3] and since that date, bills for declaratory judgments have become rampant. As a practical matter, an insurer usually being a foreign corporation and the potential liability under the policy being in excess of $3,000, it may usually bring such action in either the state or federal court, and by so doing, avail itself of the benefits of whichever court gives the more liberal interpretation to its act.

The purpose of the act is clearly not to give free legal advice promiscuously, nor to "constitute a court a fountain of legal advice to fill the cups of loitering wayfarers."[4] Borchard, probably the most eminent authority upon the general subject of declaratory judgments, has stated their objective to be genuine and worth while for the following purposes:[5]

"To afford a speedy and inexpensive method of adjudicating legal disputes.

"To make it unnecessary to destroy the status quo as a condition of bringing a contested issue or adverse claims to litigation, thus enabling written instruments, including contracts and statutes, to be construed without the necessity for prior breach, thereby preventing future litigation.

"To make it unnecessary for a plaintiff to act upon his own interpretation of his rights and at his peril as a condition of judicial action, or to forbear from a contemplated but challenged step for fear of incurring loss, thus avoiding the dangerous necessity for leaps in the dark or the alternative timorous surrender of legitimate claims.

"To remove uncertainty and insecurity from legal relations, and thus to clarify, quiet and stabilize them before irretrievable acts have been undertaken. . .

"To enable a debtor or person charged with duty, liability, danger, risk, or forfeiture, to disavow the burden, charge, or risk, and thus remove the cloud on his rights."

It appears from these comments that a plaintiff is entitled to seek a declaration that he is privileged to conduct himself as he desires or that he is free from a duty claimed by the defendant, and that this remedy will lie even where another form of relief is available. The purpose of the declaratory judgment is to end controversy, to facilitate settlement, and discourage litigation. As such it is wise and serves a useful purpose.[6] And particularly where there is a definite peril and insecurity—and where any adjudication by the plaintiff of his own right or his positive action or inaction might expose him to great hazard is the need for declaratory relief apparent.[7]

In general, courts have recognized the need for this judicial relief in the case of a liability insurer which does not know whether or not it is under a duty to defend a policy holder in a suit started by an injured third person. This rule was given a splendid start by the New Hampshire Courts. The insurer in one case was an Illinois corporation which had issued a policy covering a garage. On August 1, 1931, it cancelled that policy. In November, 1931, the policy-

1-a. Alabama,* Arizona,* California, Colorado,* Connecticut, District of Columbia, Florida, Idaho,* Indiana,* Kansas, Kentucky, Maryland, Massachusetts, Michigan, Minnesota,* Missouri,* Montana,* Nebraska,* Nevada,* New Hampshire, New Jersey, New Mexico, New York, North Carolina,* North Dakota,* Ohio,* Oklahoma, Oregon,* Pennsylvania,* Rhode Island, South Carolina, South Dakota,* Tennessee,* Utah,* Vermont,* Virginia, Washington,* Wisconsin,* Wyoming. *States starred follow to a large degree the Uniform Act.

2. See Borchard, Edwin — *Declaratory Judgments* — p. 625-6.

3. Judicial Code, Section 274D.

4. Washington Detroit Theatre Co. v. Moore 249 Mich. 673, 229 N. W. 618 (1930).

5. Borchard, Edwin—*Declaratory Judgments*, page 94-96.

6. "We are aware that the statute has been given a more restrictive cast. We are not in accord with this view.—The purpose of the statute is, we think, beneficent and wise.—We see no sound reason for limiting it." *Gully v. Interstate Natural Gas Co.*, (1936) C. C. A. 5th, 82 F. (2) 145.

"The test of the applicability of the statute is the determination of an actual controversy. The manifest intention of the legislature, as expressed in sections 6140a-6140h of the Code, was to provide for a speedy determination of actual controversies, between citizens, and to prune, as far as is consonant with right and justice, the dead wood attached to the common-law rule of "injury before action" and a multitude of suits to establish a single right.

"The fact that a plaintiff or complainant might, by the institution of an action or suit or series of actions or suits, eventually, through protracted and continuous litigation, have determined the same question that may be determined once and for all in a declaratory judgment proceedings, has never, so far as we find, been held by the courts to deprive the court of jurisdiction to enter a declaratory judgment wherein the entire rights of the parties can be determined and settled once and for all." *Chick v. MacBain*, (1931) 157 Va. 60, 160 S. E. 214.

7. "The cause of action is to be found in the petitioner's need for judicial relief, and this need exists whether he requires affirmative recognition of his own claim upon another or whether he desires to be freed from the unfounded claim of another. . . Thus, the plaintiff as actor is enabled to clarify his legal position by an adjudication of his privilege to act as he proposes or of the defendant's no-right to interfere as he threatens. A party in jeopardy or dilemma can thus resist an unfounded claim casting doubt upon his rights, without having first to suffer disability or risk, penalty or danger, by requesting a declaration that he is free from the adverse claim or under no duty to act as demanded of him, or else that he is privileged to perform or act to the extent or in the manner he proposes." Borchard, Edwin-Declaratory Judgments, page 307. See also, Borchard, page 316, 408, 419-20.

holder sustained an accident and demanded that the insurer defend the resulting litigation. Insurer refused. The insured appealed to the insurance commissioner who ruled the cancellation invalid. Upon this, insurer filed a bill for declaratory judgment to ascertain first, the duty to defend the policyholder and second, its liability under the policy. The court held that this form of action was eminently proper and overruled the action of the insurance commissioner.[8] As a matter of fact, New Hampshire seems almost to require that insurer bring such action or waive its right to set up a defense later.[9] Probably one of the most nicely reasoned decisions was rendered in 1929 by the New York Supreme Court, Appellate Division. In that case the insurer was not the moving party—and, in fact, fought the determination of the question. The policy insured a railroad against liability arising out of one accident in excess of $25,000. It appeared that four suits had been started as a result of an accident and that one had proceeded to judgment in the amount of $7500. The receiver of the railroad, then insolvent, brought an action to determine the insurer's liability. Despite the fact that total recoveries might not equal the necessary amount, the court held that a declaratory judgment action would lie. Its language is so forceful and coherent that it is set out largely in the note below.[10]

A few months ago, the Alabama court had the situation presented where the insurer contended that no coverage was afforded as the policyholder was transporting passengers for hire. The court considered the existing decisions and without hesitancy permitted the bill to lie.[11] Other state courts have been exceedingly willing to grant declaratory judgments to decide the validity of an insurance policy where the question was presented by either the insurer or the policyholder.[12] Whether or not an injured third person could ask this adjudication as to the efficacy of an automobile policy does not appear from the decided cases. If he could show that the insured were insolvent or financially irresponsible or in some other way that the insurer would necessarily be involved, it would seem that such an action would be proper.

The Federal Act has been subject to a little more hamstringing by its courts. A recent case decided by a district court sitting in Washington refused to entertain a bill to determine the insurer's liability to defend the policyholder on the ground that by so doing it would deprive the state court of jurisdiction on a question of law then pending before it.[13] There is a certain

8. "The course pursued by the plaintiff (insurer) in attempting to secure a decision upon the question of its duty to defend the suits which have been brought against the defendants in advance of their trial is undoubtedly correct. 'Ordinarily, and in the absence of agreement of the parties, the issue is one calling for preliminary presentation, so that the insurer's right or duty to defend the action for negligence may be first determind.' *Sauriolle v. O'Gorman*, (1932) 86 N.H. 39, 49, 163 A. 717, 723. The Declaratory Judgment Act (Laws 1929, chap. 86) provides a convenient procedure for determining such a question, and the present petition is properly brought thereunder." *American Motorist Ins. Co. v. Central Garage* (1933) 86 N.H. 362, 169 A. 121.

9. "The defendant as insurer had no interest to defend unless there was coverage, and this was a preliminary question to be determined.—Its defense of the action, without seeking prior determination to the issue of coverage, would therefore dispose of the issue in the plaintiff's favor." *Gibbs v. Lumberman's Mutual*, (1934) N.H. 173A 373. Whether or not the court means this language literally is difficult to say. It would appear on its face to indicate that an insurer would waive its rights by defending the policyholder even under an agreement of non-waiver.

However, the Federal District court sitting in New Hampshire believes otherwise. In *Moulton v. Owler*, 5F Supp. 700 (1934) the court refused a declaratory judgment to the Lumberman's Mutual, stating that its problem could be determined after defending the suit against the insured—and, that by defending under a reservation of rights, no waiver would result.

10. "It is true, of course, that parties cannot come into court and secure free advice to guide them in making contracts and entering upon business ventures. There must be an existing controversy, and the court must have before it the parties to the controversy, and the subject-matter so that an adjudication, when made, will serve some purpose. The court will not, by declaratory judgment, undertake to advise A what he may expect, if he enters into a certain contract with B, and if B shall act so and so in regard to the carrying out of the contract.

"But the instant case presents no such situation. Defendant is mistaken in its contention that the court is being asked to pass upon contingencies that may never occur. The necessary vital things have already occurred, or are assured, to make a real controversy. . . It would be difficult to think of a situation wherein the purpose behind section 473, Civil Practice Act, could find better vindication than the very situation we have here. One plaintiff has already recovered $7,500. There are left four negligence actions yet to be tried, to be followed, if the plaintiffs succeed in recovering over $17,500, in the aggregate, by four actions against this defendant pursuant to section 109 of the Insurance Law. At least one of these latter four actions will have to be tried as a test case. That makes five actions to be tried, four of which are of a kind that requires days to try. None of them need be, or likely will be, tried if defendant is vindicated in its claim as to the construction to be given the policy, and this issue is so narrow it can be tried in a few minutes." *Post v. Metropolitan Casualty Inc. Co.* (1929) 227 App. Div. 156, 237 N. Y. S. 64.

But see *Utica Mutual Inc. Co. v. Beers Chevrolet Co.* March 8, 1937, New York Appellate Division, Commerce Clearing House Reports, Requisition No. 173822.

11. "The general authorities are to the effect that an action may be brought by a liability insurer, under the declaratory judgment statute, against the insured and other parties who are suing the insured to recover for personal injuries or death, to have the court declare the liability vel non of the liability insurer to defend said pending suits. . . We are of the opinion, and so hold, that the bill as amended presented a justifiable question. . . An actual existing controversy within the jurisdiction of the court, between the parties to such controversy and within the meaning of our act approved September 7, 1936. . . It is not necessary, at this time, that we make other pronouncements than that the temporary injunction should have been granted to preserve the status quo." *United States Fidelity & Guaranty Co. v. Hearn* (1936) Ala., 170 So. 59, rehearing denied October 8, 1936.

12. The following cases are particularly helpful.

Old Colony Coach Lines v. Hartford, A. & I. Ins. Co. (1937) U. S. Dist. Ct., Commerce Clearing House Reports, Policy Contracts. Requisition No. 170949.

Frasch v. London & L. Fire Ins. Co. (1931) 213 Cal. 219, 2 P. (2) 147.

Supreme Tent v. Dupriest (1930) 235 Ky. 46, 29 S. W. (2) 599.

Mason v. Mason (1931) 239 Ky. 208, 39 S. W. (2) 211.

Updike Ins. Co. v. Employer's Liability of London (1935) 128 Neb. 295, 258 N. W. 470.

American Motorists Ins. Co. v. Kopka (1936) New Hampshire, 186 A. 335.

Travelers Ins. Co. v. Greenough (1937) New Hampshire, 190 A. 129.

American Motorists v. Rush (1937) New Hampshire, Commerce Clearing House Reports, Policy Contracts, Requisition No. 160274.

Continental Casualty Co. v. Burton et al., March 15, 1937, New Hampshire, Commerce Clearing House Reports, Requisition No. 173960.

Smith v. Interstate Passenger Service et al., March 15, 1937, New Hampshire, Commerce Clearing House Reports, Requisition No. 173966.

Utica Mutual Ins. Co. v. Glennie (1928) 132 Misc. 899, 230 N. Y. S. 673.

New Amsterdam Casualty Co. v. Hyde (1934) 148 Ore. 229, 34 P. (2) 930, rehearing denied 35 P. (2) 980.

Malley v. American Indemnity Co. (1929) 297 Pa. 216, 146 A. 571.

13. *Associated Indemnity Co. v. Manning* (1936) 16 F. Supp. 430.

scintilla of logic in the court's position. An insurer which is reluctant to let a material issue be passed upon by a state court might attempt to jerk the case into Federal court upon any pretext whatsoever. But, if that one particular issue is the entire determining factor concerning the insurer's liability, it is difficult to see what harm could thereby result. After all, cases have been transferred for decades from state to Federal courts by parties solely because of their preference for the latter court. And if there is a real ground for a declaratory judgment, proper grounds for Federal jurisdiction, and a probable injury or risk, the court's excuse seems insignificant indeed. Justice should be a matter common to all courts—and if it is acknowledged that Justice can be obtained in the Federal court, a Federal judge should scarcely deny jurisdiction upon that one ground alone.

Fortunately, the general Federal rule appears to be the other way. A district court sitting in Texas handed down in 1935 a decision which has become one of the leading cases upon this subject. The court took cognizance of an action brought by the insurer to determine whether or not the operator of the vehicle was one acting within the scope of the omnibus clause. The court entertained the suit and found for the insurer.[14] At practically the same time another action presented in that Federal court was upheld.[15] A decision handed down in December, 1936, approves this form of action by the insurer in order to determine its rights in advance.[16]

Accordingly, the *Manning* case seems to be a by-road beaten by a judge who either will not or cannot acknowledge the wisdom and justice of an extended use of declaratory judgments. Since no Circuit Court of Appeals has yet passed upon this question, no district judge is bound to follow any of the Federal decisions cited. But it is no longer a question of conjecture what at least one circuit court will do when the question is squarely presented. In 1936 the Fifth Circuit discussed the application of the act in another situation.[17] In so doing it expressed its warm approval of the cases of *Ohio Casualty Company v. Plummer*[18] and *American Motorists v. Central Garage*,[19] both of which are leading decisions favoring a liberal interpretation. The court went on to quote extensively from Borchard and expressed its disapproval of the result reached in another federal district court case where the court refused to allow the insurer to bring such an action.

An interesting reaction to the contrary was rendered by the Federal district court sitting in New Hampshire. The court determined the issue upon another matter so that its comments are in the nature of *obiter dicta*. The decision gives the following line of argument. A is injured by the tort of B. He is not interested in C's contractual obligations with B. A is interested only in securing a speedy and effective judgment against B. What right has C, therefore, to enjoin A's action against B until his contractual obligations with B, in which A has no interest, are determined?

This is a very pretty and an acute argument. At first glance, it appears extremely sound. It has, however, one gross error in logic. A *does* have a vital interest in the contractual relations of B and C. He has a contingent right of action against C—dependent first, upon the establishment of B's liability, and second, upon the validity of the insurance policy. A stands somewhat in the position of a creditor beneficiary and, as such, is interested in any declaration made as to the policy's validity. It may be contended that this argument is unsound where B is solvent and A desires to proceed only against him. If A will come into court and relinquish all claims against C, the insurer, in most cases the insurer will be only too glad to forbear to bring an action for a declaration. As a matter of fact, if B is a person of means, the insurer knows that it may depend upon him to use every effort to defeat the action for personal injuries, and may, therefore, disclaim liability and withdraw from the defense knowing that it will be properly conducted. It is usually where B is insolvent that the insurer faces the dilemma of disclaiming or defending. There are not over 5% of all personal injury suits brought wherein the plaintiff would relinquish a potential claim against the insurer rather than face a slight delay. Is it not justifiable, under these circumstances, to permit declaratory judgment actions to lie rather than to defeat in every instance the good wrought by such an action?

These seem sufficient illustrations to point out the reasoning in favor of either granting or denying petitions for declaratory judgments brought to determine the validity of automobile liability policies. There are, however, certain allegations which must be made in order to confer proper jurisdiction upon the court. Let us examine the more important of these.

14. "It clearly appears both from the pleadings and the evidence that the defendants (other than the Plummers) are claiming that the negligence of the Plummers caused the injury and death of York, and their injuries; that they are entitled to sue and have judgment for their damages for such injuries against the Plummers, Carl Short, Inc., and Carl Short; that each defendant may sue them in a separate suit; and if and when they obtain judgment against them, each may then sue and be entitled to judgment against plaintiff, under the provisions of the policy. It also appears that under the provisions of the policy plaintiff, if liable to defendants, is required to defend each and all of the many suits which defendants may thus bring. That under these facts, there is an actual controversy within the meaning of the act and that the act is applicable I entertain no doubt." *Ohio Casualty Ins. Co. v. Plummer* (1935) 13 Fed. Supp. 169.

15. *Commercial Casualty Ins. Co. v. Humphrey* (1935) 13 Fed. Supp. 174.

16. *Ohio Casualty Ins. Co. v. Cook* (1936) U. S. Dist. Ct., Commerce Clearing House Reports, Current Decision Contracts, Requisition No. 167549.

See also

Old Colony Coach Lines v. Harford A. & I. Ins. Co. (1937) U. S. Dist. Ct., Commerce Clearing House Reports, Policy Contracts. Requisition No. 170949.

See also *Travelers Inc. Co. et al. v. Young*, United States District Court, New Jersey, March 6, 1937, Commerce Clearing House Reports, Requisition No. 173981.

17. "For while it may not be doubted that the Federal Declaratory Judgment Act is a purely remedial statute, and does not purport to, nor does it, add to the content of the jurisdiction of the national courts, it certainly does purport in cases where federal jurisdiction is present, to effect and we think it does, effect thoroughgoing, remedial changes, by adding to the coercive or warlike remedies in those courts by way of prevention and of reparation, the more pacific and more prophylactic one of a declaration of rights. When, then, an actual controversy exists, of which, if coercive relief could be granted in it the federal courts would have jurisdiction, they may take jurisdiction under this statute, of the controversy to grant the relief of declaration, either before or after the stage of relief by coercion has been reached." (Citing *Borchard, Ohio Casualty Co. v. Plummer* and *American Motorist Cases* with approval). "We are aware that the statute has been given a more restrictive cast. We are not in accord with this view. . . The purpose of the statute is, we think, beneficient and wise. . . We see no sound reason for limiting it." *Gully v. Interstate Natural Gas Co.* (1936) C.C.A. 5th, 82 Fed. (2) 145.

See also *Aetna Life Ins. Co. v. Haworth*, March 1, 1937, 57 Supreme Court Reports 461. In this case the Supreme Court of the United States definitely approves the use of declaratory judgments in insurance actions. This decision should clearly discredit the *Manning* and *Moulter* cases.

18. See note 14, *supra*.

19. See note 8, *ibid*.

It is absolutely vital that the plaintiff in such action join any and all parties interested in the result. He must make parties defendant the insured, any additional insured, all injured persons, and any other persons who might at any time be interested in the results of the controversy. Thus, if the insurer fails to join the injured employee under a compensation policy,[20] or third party claimants in the ordinary automobile case an action will not lie.[21] One Federal decision gives an interesting discussion of this proposition stating that any injured person, even though not making any claim against the insured, was a proper party defendant. If, however, such defendant comes into court and pleads that he was not injured and had not made nor contemplated making any claim, he should be dismissed as not a necessary party.[22] This clearly defines the insurer's duty. It should join any persons having any interest whatsoever. If any person so joined desires to come into court and place himself on record as being uninjured, the insurer profits thereby.

The second important element of procedure is that the insurer must set up a definite peril or hazard in acting as it desires. This peril, as previously pointed out, arises in making the decision as to whether or not to defend suits brought against the insured. In nearly every policy of automobile insurance there is a clause reading somewhat as follows: "It is further agreed that as respects insurance afforded by this policy under coverages A and B the company shall defend in his name and behalf, any suit against the insured even if such suit is groundless, false or fraudulent." If the policy is valid, the duty to defend such actions devolves upon the insurer. If the policy is invalid for any reason, the insurer is freed from this obligation. It has been held in numerous cases that the determination of existence or non-existence of this duty is such a hazardous matter as will justify the rendition of a declaratory judgment.[22a] The allegation of such a matter will give a court jurisdiction when proper parties are present before it. Such allegation not only constitutes a statement of an existing peril or hazard but sets up an actual existing controversy.

At this point, Michigan appears to reach a peculiar result. In the historical development of declaratory judgments in this country, Michigan was notorious for its narrow and restrictive interpretation of its act. It later seemed to liberalize its holding. In *Lawrence v. American Surety Company*,[23] the court permitted the state treasurer to test the validity of certain clauses in insurance policies by an action of declaratory judgment. On December 8, 1936, the Michigan court passed upon two cases. In one of them, *Wolverine Mutual Insurance Company v. Clark*[24] the petition for a declaratory judgment was rejected upon the basis of improper service and wrong venue. In discussing the question, the court mentioned briefly the insurer's right to such an action and declared: "under some policies the obligation to defend is wholly severable from the final duty to pay the judgment." From this, the writer gathered that the court would grant a declaratory judgment to decide the insured's liability to defend actions brought against the insured. The court, however, in the companion decision of *State Farm Mutual v. Wise*[25] refused a declaratory judgment where parties were properly brought before the court.

In this latter decision the court refers only to plaintiff's petition as requesting an adjudication of liability under the policy and does not discuss in any respect the duty to defend the insured. The court's language seemed to imply that such issue was not raised. Since both the *Wolverine* and *Wise* cases were handled by the same firm of attorneys, the writer secured a copy of the petition filed in the latter case. In it, the attorney for the insurer, Mr. Cholette of Grand Rapids, specifically brought out the duty of insurer to defend such suits and prayed a declaratory judgment that such was not required in the instant case. It is entirely possible that Mr. Cholette failed to stress this point sufficiently or that he overcame the force of that argument when he pointed out that the insurer could disclaim liability and withdraw from the defense. In view of the fact that this issue was proper for the court's attention, we can only draw two conclusions: (1) The court overlooked this issue or failed to observe it as a separate point. (2) That the Michigan courts definitely reject the majority view. Until it more positively asserts its holding we can only advise the insurer to go into Federal Court in Michigan cases.

Assuming then that the majority of courts will agree in granting declaratory judgments, what types of policy defenses will be construed? The writer feels that every defense of any nature whatsoever may be construed by the court. Of course, the action must be bona fide. The insurer acts at its peril in bringing a suit for declaratory judgment upon some fictitious ground—for an adjudication, once made, is thereafter binding upon all parties to it as to the validity of the policy, except, of course, where another defense subsequently develops. The following types of policy questions have been considered by the various courts:

1. Representation as to ownership.[26]
2. Who are employees under policy exclusion.[27]
3. Operator acting within scope of omnibus clause.[28]

20. *Updike Ins. Co. v. Employer's Liability of London* (1935) 128 Neb. 295, 258 N. W. 470.

21. *Commercial Casualty Ins. Co. v. Humphrey* (1935) 13 Fed. Supp. 174.
Wolverine Mutual Ins. Co. v. Clark (1936) Michigan, 270 N. W. 167.

22. *Commercial Casualty Ins. Co. v. Humphrey* (1935) 13 Fed. Supp. 174.

22a. *Ohio Casualty Insurance Co. v. Plummer* (1935) 13 Fed. Supp. 169.
Ohio Casualty Insurance Co. v. Cook (1936) U. S. Dist. Ct., Commerce Clearing House Reports, Current Decision Contracts, Requisition No. 167549.
Old Colony Coach Lines v. Hartford A. & I. Ins. Co. (1937) U. S. Dist. Co., Commerce Clearing House Reports, Policy Contracts, Requisition No. 170949.
United States Fidelity & Guaranty Co. v. Hearn (1936) Alabama, 170 So. 59.
American Motorists v. Central Garage (1933) 86 N. H. 362, 169 A. 121.
Gibbs v. Lumberman's Mutual (1934) New Hampshire, 173 A. 373.

23. *Lawrence v. American Surety Co.* (1933) 263 Mich. 586, 249 N. W. 3, 250 N. W. 295.

24. *Wolverine Mutual Ins. Co. v. Clark* (1936) Michigan, 270 N. W. 165.

25. *State Farm Mutual Auto. Ins. Co. v. Wise* (1936) Michigan, 270 N. W. 167.

26. *Malley v. American Indemnity Co.* (1929) 297 Pa. 216, 146 A. 571.

27. *Utica Mutual Ins. Co. v. Glennie* (1928) 132 Misc. 899, 230 N. Y. S. 673.

28. *Ohio Casualty Co. v. Plummer* (1935) 13 Fed. Supp. 169.
Travelers Ins. Co. v. Greenough (1937) New Hampshire, 190 A. 129.
Smith v. Interstate Passenger Service et al., March 15, 1937, New Hamsphire, Commerce Clearing House Reports, Requisition No. 173966.
Travelers Ins. Co. v. Young, United States District Court New Jersey, March 6, 1937, Commerce Clearing House Reports, Requisition No. 173981.

4. Passengers for hire.[29]
5. Payment of premiums.[30]
6. Operation by chauffeur.[31]
7. Effective cancellation.[32]
8. Bodily injuries.[32a]
9. Other exclusions.[32b]
10. Breach of such conditions precedent as notice or cooperation.[32c]

Let us take the following situation. A, the injured person, brings an action for damages against B, the insured. May C bring an action and secure a temporary injunction to maintain the status quo? Many lawyers who are certain of the propriety of a declaratory judgment itself have had a little difficulty with this proposition. The only case indicating to the contrary, as previously stated, seems to be *Moulton* v. *Owler*.[33] The weight of authority is clearly the other way.[34]

The courts now are in a transitional stage. Some decisions are clear and logical in their language and act as beacons or sign-posts to the lawyer who has to struggle through the morass of legal verbiage enunciated by other courts. It should be remembered that the purpose of the Declaratory Judgment Acts is to discourage technicality and to encourage a settlement of controverted issues by submission to a competent court. To that end they are to be liberally and freely construed. Technical interpretations serve only to defeat the purpose of such acts. Courts should frown upon litigants who challenge the validity of such proceedings upon every occasion and thereby seek to prolong expensive litigation in trial courts.

This purpose is peculiarly and especially served by permitting an automobile insurer to raise this issue in conjunction with its duty to defend the insured in actions brought by injured third parties. Any other action which it may take will expose it to peril and untold expense. Certainly if courts can alleviate this situation by a brief discussion of the legal principles underlying such defenses it owes that duty to the public. Public policy has been declared by the legislatures by the passage of these acts—and regardless of custom, prejudice, or belief—the courts should interpret them liberally to fulfill this purpose.

29. *United States Fidelity & Guaranty Co. v. Hearn* (1936) Alabama, 170 So. 59.

30. *Frasch v. London & L. Fire Ins. Co.* (1931) 213 Cal. 219, 2 P. (2) 147.
Updike Ins. Co. v. Employer's Liability of London (1935) 128 Neb. 295, 258 N. W. 470.

31. *Ohio Casualty Ins. Co. v. Cook* (1936) U. S. Dist. Ct., Commerce Clearing House Reports, Current Decision Contracts, Requisition No. 167549.

32. *American Motorists Ins. Co. v. Central Garage* (1933) 86 N. H. 362, 169 A. 121.
Old Colony Coach Lines v. Hartford A. & I. Ins. Co. (1937) U. S. Dist. Ct., Commerce Clearing House Reports, Policy Contracts, Requisition No. 170949.

32a. *American Motorists Ins. Co. v. Kopka* (1936) New Hampshire, 186 A. 335.

32b. *American Motorists v. Rush* (1937) New Hampshire, Commerce Clearing House Reports, Policy Contracts, Requisition No. 160274.
Ohio Casualty Ins. Co. v. Cook (1936) U. S. Dist. Ct., Commerce Clearing House Reports, Current Policy Contracts, Requisition No. 167549.
Continental Casualty Co. v. Buxton et al., March 13, 1937, New Hampshire, Commerce Clearing House Reports, Requisition No. 173960.

32c. *Commercial Casualty Ins. Ins. Co. v. Humphrey* (1935) 13 Fed. Supp. 174.

33. "Basing their rights to have the question of coverage determined under the New Hampshire statute and the decisions of the New Hampshire Supreme Court, the defendants' counsel entered a special appearance in the actions at law, and claimed that the trial should be postponed until the question of liability of the insurance company's coverage and duty to defend the assured had been determined. The right of the plaintiffs in this action at law to have their actions speedily tried and determined ought not to be held up because of some contract between the defendants and a third person or corporation to which they are not a party. . . Were the question of a declaratory judgment involved in this limited discussion, it would present a very troublesome question." (Court resolves question upon right of insurer to defend and not be estopped if it sends a notice of reservation of rights). *Moulton v. Owler* (1934) New Hampshire, 5 Fed. Supp. 700.
See also *National Casualty Co. v. Schaffer* (1936) U. S. Dist. Ct., Commerce Clearing House Reports, Policy Contract Decisions, Requisition No. 163205.

34. See *United States Fidelity & Guaranty Co. v. Hearn* (1936) Alabama, 170 So. 59.

Arrangements for Annual Meeting, Kansas City, Missouri

September 27—October 1, 1937

HEADQUARTERS:
MUNICIPAL AUDITORIUM

Hotel accommodations, all with bath, are available as follows:

	Single for one person	Double (Dble. bed for two persons)	Twin beds for two persons	Parlor Suites
	$	$	$	$
Aladdin	2.00 to 2.50	3.00 to 5.00	4.00 to 7.00	
Ambassador	3.00 to 4.50	5.00 to 8.00		
Baltimore	3.00 to 4.00	4.00 to 9.00	5.00	
Bellerive		5.00	6.00	8 & up
Bray	2.00 to 3.00	3.00 to 5.00		
Commonwealth	2.50 to 3.00	4.00 to 5.00	5.00 to 6.00	8
Kansas Citian	2.50 to 3.00		3.50 to 6.00	10
Phillips	3.00 to 5.00	5.00 to 8.00	6.00 to 8.00	10 to 20
Pickwick	3.00 to 4.00	4.00 to 5.00	5.00 to 6.00	
President	2.50 to 3.50	3.50 to 5.00	4.50 and up	15 to 20
Robert E. Lee	1.50 to 2.50	2.50 to 3.50	3.50 to 4.00	
Savoy	2.50	5.00		6 to 12
Sexton	2.00	3.00	5.00	
Stats	2.50 to 3.50	3.50 to 5.00	6.00 to 7.50	
Westgate	1.50 to 2.50	2.50 to 3.50		

(All space at the Muehlebach exhausted.)

Explanation of Type of Rooms

A single room contains either a single or double bed to be occupied by *one person*. A double room contains a double bed to be occupied by *two* persons.

A twin-bed room contains two beds to be occupied by two persons. A twin-bed room will not be assigned for occupancy by one person.

A parlor suite consists of parlor and communicating bedroom containing double or twin beds. Additional bedrooms may be had in connection with parlor.

To avoid unnecessary correspondence, members are requested to be specific in making requests for reservations, stating hotel desired, number of rooms required and rate therefor, names of persons who will occupy the same, and arrival date, including definite information as to whether such arrival will be in the morning or evening.

Requests for reservations should be addressed to the Executive Secretary, 1140 North Dearborn Street, Chicago, Illinois.

CRITICAL STAGE IN SUPREME COURT FIGHT

(*Continued from page* 495)

6th a resolution for the submission of an amendment to the Constitution (S. J. Res. 100). A revised form was offered on June 10th as an "Amendment (in the nature of a substitute) intended to be proposed by Mr. Andrews to the joint resolution (S. J. Res. 100) proposing an amendment to section 1, article III, of the Constitution of the United States relating to the judiciary." It is being favorably considered by many of those who believe that the people should be given the decision whether they wish the Federal judicial system to be radically changed.

The constitutional amendment proposed by Senator Andrews provides principally for increasing the size of the Supreme Court to eleven—a Chief Justice and ten Associate Justices, one for each Federal judicial circuit. This would mean the immediate addition of two Justices to the Court. Appointments could not be made to the Court from a circuit already represented in the membership of the Court, until all circuits are represented. Compulsory retirement of members of the Court at the age of 75 years is provided. The amendment would thus increase the size of the Court permanently to eleven, and two new Justices immediately to the Court, and compel the retirement of at least four members of the present Court, with appointment of their successors.

The full text of the proposed amendment to the Constitution (S. J. Res. 100) is:

"That the following amendment, when ratified by three-fourths of the several States, shall replace section 1 of article III of the Constitution of the United States of America:

"'ARTICLE III

"SECTION 1. The judiciary power of the United States shall be vested in a Supreme Court, circuit courts of appeal, district courts, and such inferior courts as the Congress may from time to time ordain and establish. The Justices and judges of said courts shall be appointed by the President, by and with the advice and consent of the Senate. They shall hold their offices during good behavior as herein provided and shall receive at stated times for their services a compensation which shall not be diminished during their continuance in office: *Provided*, That any Justice or judge of said courts having held a commission or commissions as such Justice or judge for at least ten years, continuously or otherwise, may voluntarily retire upon attaining the age of seventy years, and shall automatically retire upon attaining the age of seventy-five years and, in either instance, shall thereafter receive the same annual compensation of which he was in receipt at the time of his retirement.

"The Supreme Court shall be composed of a Chief Justice appointed from the United States at large, and one Associate Justice appointed from the territory composing each of the circuit courts of appeal. No vacancy in the office of any Associate Justice of the Supreme Court which shall occur by reason of this amendment or for any cause shall be filled by the appointment of any person who has not been a citizen for ten years last past of the territory of a circuit court of appeals of which no incumbent Associate Justice was a citizen at the time of his induction to office; *Provided*, That if upon this amendment becoming effective the territory of a circuit court of appeals shall be represented on the Supreme Court by more than one Associate Justice, then no appointment to the extent of such excess representation shall be made from an unrepresented circuit until such excess representation shall cease.

"The respective circuit courts of appeal shall be composed of at least one judge from each State included within the territory comprising such court, the senior member of which shall be the presiding judge.

"'This section shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within five years from the date of its submission.'"

The proposal by Senator Andrews is along sound lines to the extent that it would accomplish the reorganization of the Courts of the United States only through the submission of a constitutional amendment, on which the States and the people would make the decision. If submitted and ratified, this proposal would re-make the Supreme Court more thoroughly than the proposals of the Message of February 5, 1937, would have done.

PROSPECTS FOR PASSAGE OF A SO-CALLED "COMPROMISE"

The factors which will determine whether some "compromise" measure will pass the Senate, and what will be its form, cannot be appraised with accuracy at this time. Some of the most sincere and far-seeing advisers among those who supported the original proposal for a six-judge increase are protesting against acquiescence in any manner or form of "compromise." They contend that either the President should secure and accept full responsibility for the Court and make it truly accountable to the executive and legislative program, or the Federal judiciary should be left in a wholly independent relationship, open to frank criticism by the executive and legislative branches of government should occasion arise. Such advisers assert that the enactment of any of the so-called "compromises" would vest the President with responsibility for the Court without actual control. Still wiser advisers point out that the policy-determining branches of government are in better position before the country, if their measures are submitted to the scrutiny of a wholly independent judiciary, subject always to the right of the executive and legislative branches to seek a change of decision by the Courts and to the right of the people to override the results of judicial decision by appropriate constitutional amendments.

At this time it appears probable that several Senators who supported the original proposal to add six Justices to the Court will oppose all of the so-called "compromises" for a lesser number or a retarded time schedule of additions. On the other hand, several Senators who opposed the wholesale addition of six Justices may now vote for some partial and piecemeal

dilution of the Court. These are factors of uncertainty as to the ultimate result in the Senate, when the decisive votes are taken, a month or so hence.

CONSTITUTIONAL AMENDMENTS MAY CLAIM SERIOUS CONSIDERATION

Various proposals to deal with the Court situation through the orderly course of the submission of a constitutional amendment, on which the States and the people would have an opportunity to pass, have been pending before the Judiciary Committee of the Senate. They have been held in abeyance because of the priority of the Ashurst-Maverick bill. Some of these may soon be reported for consideration by the Senate, and will in that event figure in the deliberations and votes in that body. Agreement is said to have been reached by the Judiciary Committee, to take up and vote on these various constitutional amendments on July 12th.

These amendments are varied in form and substance. Some would increase the Court to eleven members; others would give constitutional sanction for retaining its present size. Most of the amendments provide for the compulsory retirement of Justices at the age of 70 years or 75 years; some of the amendments couple this with a provision that retirement of not more than one Justice (the senior) shall be compelled in any one year.

How many, if any, of the proposed amendments will be reported to the Senate by the Judiciary Committee cannot now be forecast. A matter of such profound importance as any re-making of the Supreme Court ought to be dealt with only through the orderly processes of the submission of a constitutional amendment, which would give to the States and the people an opportunity to decide whether or not they wish such changes to be made in the great Court.

From the first, the representatives of the American Bar Association have urged that changes in the Supreme Court should be dealt with only through the submission of a constitutional amendment to the people and the States, rather than through mere laws enacted by the legislative and executive branches of government. If the "compromise" sought by the sponsors of the original proposal is now solely along the lines of a constitutional amendment, there can be no quarrel with it as to method. Such a submission would hardly be a "compromise," at all, as the States and the people would have the final say. As a believer only in orderly methods of making changes in the fundamental institutions of our country, I sincerely hope that this course will be followed by the Congress.

PUBLIC OPINION SHOULD RALLY TO DEFEAT "COMPROMISE"

With the fight to save the Court at its critical stage, where every vote in opposition is greatly needed, it seems to be clear that there ought to be a renewed and emphatic manifestation of the opinion of the whole country on the Court issue. That the opinion of the public, irrespective of locality, political affiliation, and station in life, is preponderantly and overwhelmingly against any re-making of the Court, is confirmed by all indications. Unfortunately, in spite of all warnings to the contrary, the impression is widespread that the fight to re-make the Supreme Court had been defeated or abandoned. That is not the fact. Neither will take place, unless the public protest is again renewed and made manifest.

Public meetings can be, and are being, held despite the hot weather. *Letters and telegrams to Senators and Congressmen should make clear and emphatic the views of citizens as to the Logan-Hatch-Ashurst bill (S. 1392) and any other so-called "compromise" measure* that is receiving serious consideration. Particularly should members of the Judiciary and Rules Committees of the House be acquainted with the views of citizens. Lawyers should take the lead in bringing these things about, immediately and in every community. The fight to save the Supreme Court should not fail now, because of hot weather, the vacation period, the flight of time, or the prevalence of the wholly incorrect impression that the fight has already been won. The really dangerous and critical stage of the long, hard contest is undoubtedly at hand.

RESEARCH STATEMENT OF JUNIOR BAR CONFERENCE ON SUPREME COURT ISSUE

THE Special Committee on the Supreme Court Proposal has been accumulating a great deal of material on the subject which is of interest to lawyers and others.

One of the larger items is the Research Statement prepared by the Junior Bar Conference during the course of the Hearings before the Senate Judiciary Committee. This is a 204 page pamphlet containing a statement by Hon. Edward R. Burke of Nebraska on the business of the Supreme Court, an answer to the testimony in behalf of the President's Plan as presented to the Committee, and 44 Exhibits supporting the same, with many quotations. This Research Statement was filed with the Judiciary Committee of the U. S. Senate, April 28, 1937. The first eight Exhibits include an analysis in detail of the Testimony of the Witnesses in behalf of the Plan, and an answer thereto. The other Exhibits include, besides quotations, many valuable memoranda on significant issues in the controversy. This statement has already been sent to the Presidents of State and Local Bar Associations, to members of the official group of the American Bar Association and to active workers in the Junior Bar Conference.

Single copies of this pamphlet will be furnished free to members of the Association generally upon application to the headquarters, 1140 North Dearborn Street, Chicago, Illinois. Copies may be obtained by others at 25 cents each, $20.00 per 100.

THE INQUISITORIAL POWER OF CONGRESS

(*Continued from page* 516)

papers, *subject to the usual rights of witnesses in such cases.*"[47] In the light of decisions of the Supreme Court such as the *Harriman* case, *United States* v. *Louisville and Nashville R. Co.* and the *American Tobacco Company* case indicating its unwillingness to attribute to Congress an intention to destroy Anglo-Saxon traditions, it seems likely that, in the absence of language compelling a contrary conclusion, a resolution of either house giving a committee authority to investigate a matter and to subpoena persons and papers would be construed as not intended to confer upon the committee power to violate fundamental privileges of witnesses existing at common law.

V.

Contumacy of a person called upon to testify or produce documents at an investigation by either house of Congress subjects him to indictment under section 102 of the Revised Statutes[48] and also to punishment for contempt.[49] If the former method is pursued, the case is an ordinary criminal prosecution in which the defendant is entitled to a trial by jury and to the protection conferred by the Constitution and the laws of the United States upon defendants in criminal proceedings.[50]

The implied power of each house of Congress to punish direct contempts committed by private citizens was recognized and upheld "on the principle of self-preservation" early in our history in the case of *Anderson* v. *Dunn*.[51] The action was one for assault and battery and false imprisonment against the Sergeant-at-Arms of the House of Representatives, whose plea that he had acted under a warrant of arrest issued by the House which required that the plaintiff be brought before its bar to answer charges of contempt was sustained. The Court, through Mr. Justice Johnson, expressed the opinion that the power of punishment which might be implied was " 'the least possible power adequate to the end proposed;' which is the power of imprisonment," and that an imprisonment for contempt must terminate with the adjournment of the legislative body.[52]

Nearly a century later, in *Marshall* v. *Gordon*,[53] it was held in a habeas corpus proceeding that a federal district attorney who had sent to the chairman of a sub-committee of the House of Representatives and published in the press a letter in which the sub-committee was charged, in unparliamentary and ill-tempered language, with having endeavored to interfere with the action of a grand jury should be discharged from the custody of the Sergeant-at-Arms, who had arrested him pursuant to a warrant issued under authority of the House. The Court, through Chief Justice White, said that the power of the House to punish for contempt "rests only upon the right of self-preservation, that is, the right to prevent acts which in and of themselves inherently obstruct or prevent the discharge of legislative duty or the refusal to do that which there is an inherent legislative power to compel in order that legislative functions may be performed," and reaffirmed the view expresed in *Anderson* v. *Dunn* that the power is limited to imprisonment not extending beyond the session of the house in which the contempt was committed.

Recently, in *Jurney* v. *MacCracken*,[54] the Supreme Court held that the Senate has power to punish a citizen for a past contempt. MacCracken was charged with having removed and destroyed certain papers after he had been served with a subpoena duces tecum by a Senate committee. The case came to the Supreme Court on the demurrer of the Sergeant-at-Arms of the Senate to a petition for a writ of habeas corpus. In an opinion by Mr. Justice Brandeis, the Court said that "where the offending act was of a nature to obstruct the legislative process, the fact that the obstruction has since been removed, or that its removal has become impossible is without legal significance," and that the question with which the Court was concerned was "vindication of the established and essential privilege of requiring the production of evidence." The power to punish for past contempts was held to be "an appropriate means" of such vindication. In concluding his opinion Mr. Justice Brandeis said: "The contempt with which MacCracken is charged is 'the destruction and removal of certain papers.' Whether he is guilty, and whether he has so far purged himself of contempt that he does not now deserve punishment, are the questions which the Senate proposes to try. The respondent to the petition did not, by demurring, transfer to the court the decision of those questions. The sole function of the writ of habeas corpus is to have the court decide whether the Senate has jurisdiction to make the determination which it proposes."

The acts alleged to have been committed by MacCracken were held to be within the zone of direct obstructions to legislative processes. In *Marshall* v. *Gordon* the acts of the district attorney were held to be outside of that zone. This difference resulted in the holding in the *MacCracken* case that the Court would not interfere on a writ of habeas corpus *to prevent a trial* by the Senate of the question of guilt or innocence. The *MacCracken* case does not hold that the courts are without jurisdiction to release on habeas corpus persons actually committed for contempt by the Senate or the House of Representatives.

The courts, it is believed, have power to release persons imprisoned for contempt by either house of Congress not only in those instances where the act committed did not directly interfere with legislative processes, but also in cases where the hearing accorded was manifestly lacking in due process or an unconstitutional penalty was inflicted or the order of commitment for other reasons is void. It may be that either house, like a court, can summarily commit a person for

47. 103 U. S. at 190; emphasis supplied.

48. 2 U. S. C. A. sec. 192.

49. Double jeopardy is not a defense. *Jurney* v. *MacCracken*, 294 U. S. 125, 151; *In re Chapman*, 166 U. S. 661, 672; *United States* v. *Houston*, 26 Fed. Cas. 379.

50. The *Sinclair* case, *supra* note 9, was a prosecution under the statute. So was the *Chapman* case, *supra* note 5, in its earlier stages.

51. 6 Wheat. 204 (1821). This case involved an attempt to bribe a member of the House of Representatives. Hind's Precedents, sec. 1606; *McGrain* v. *Daugherty*, 273 U. S. at 169.

52. The Court in this case (pp. 233-234) expressed the opinion that "neither analogy nor precedent" afforded a basis for implying a power in the President to punish contempts.

53. 243 U. S. 521 (1917).

54. 294 U. S. 125 (1935).

a direct contempt committed in its presence;[55] but in cases where the conduct said to constitute contempt did not occur in the presence of the legislative body, due process requires that notice of the charges shall be given, and that the accused shall be afforded a reasonable opportunity to meet them, with the right to the assistance of counsel, the right to call witnesses and the right to testify in person.[56] Due process also demands that evidence of guilt shall be produced,[57] and, as was said in *Hebert* v. *Louisiana*[58] with respect to the Fourteenth Amendment, that the proceeding "shall be consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions and not infrequently are designated as 'law of the land.' "[59]

In the *Daugherty* case[60] the Supreme Court, in answering a contention that the power of inquiry, if sustained, might be abused, said that it "must assume, for present purposes, that neither house will be disposed to exert the power beyond its proper bounds, or without due regard to the rights of witnesses," and added that "if, contrary to this assumption, controlling limitations or restrictions are disregarded, the decisions in *Kilbourn* v. *Thompson* and *Marshall* v. *Gordon* point to admissible measures of relief." And recently, in *Hearst* v. *Black*,[61] the Court of Appeals for the District of Columbia expressed the opinion that if the appellant, whose telegraph messages in the files of the telegraph companies had been unlawfully copied by the Federal Communications Commission at the request of a Senate committee, "were before the Senate committee as a witness and were questioned as to matters unrelated to the legislative business in hand, as his bill alleges is true of the messages in question, he would be entitled to refuse to answer; and if, for his supposed contumacy, he were imprisoned, he could secure his release on habeas corpus."

In the well known case of *Moore* v. *Dempsey*[62] the Supreme Court held that where the facts alleged in a petition for a writ of habeas corpus, if true, would make the trial of the petitioner in a state court absolutely void, the federal court in which the writ is sought must ascertain whether "the facts alleged are true and whether they can be explained so far as to leave the state proceedings undisturbed." In cases where it reviews judgments of state courts in criminal cases on certiorari or writ of error the Supreme Court, it is now clear, has power to examine the evidence where the claim is made that rights guaranteed by the federal Constitution were denied by state tribunals.[63] The decision in *Moore* v. *Dempsey* demands the same searching review in cases arising on a petition for a writ of habeas corpus.

The application of the decision in *Moore* v. *Dempsey* to orders of commitment entered by either house of Congress in contempt proceedings can hardly be doubted.[64] The conclusion reached by the Senate or the House as to the guilt of the accused in a contempt case where it has jurisdiction, if due process is accorded and other constitutional rights are not denied, is doubtless conclusive;[65] but where the order of commitment is for any reason void, he is entitled to release from custody on a writ of habeas corpus.[66]

CONCLUSION

The full scope of the inquisitorial power of each house of Congress is not yet known. Generally speaking, it may be said that each house has implied power to conduct investigations in aid of constitutional powers which may be exercised by it or by Congress with finality,[67] provided the power is one which permits of investigation;[68] but neither house is vested with "general" power to investigate private affairs. The only restraints on the inquisitorial power of each house are those expressed in the Constitution or found in its implications. Among these implications are those resulting from our dual system of government. This dual system, it is believed, prevents either house of Congress from conducting a compulsory inquiry into "local" matters in aid of the express power of Congress to propose constitutional amendments.

In the exercise of their respective powers of inquiry each house may act directly or through committees, and may employ its own process to compel the attendance of witnesses and the production of papers. The scope of power of an investigating committee is determined by consideration of the resolution under which it is acting in the light of the constitutional authority of the house which created the committee.

The rights of private citizens summoned to give evidence before either house or committees thereof have not been fully announced by the courts. It is clear, however, that neither house has power to subject a private citizen to a general inquiry into affairs purely personal or beyond the jurisdiction of the house which is conducting the inquiry, nor to compel disclosures of matters not pertinent to an inquiry legislative in nature, and that constitutional rights of the individual may not

55. *Ex Parte Terry*, 128 U. S. 289.

56. *Cooke* v. *United States*, 267 U. S. 517; *Powell* v. *Alabama*, 287 U. S. 45. A mere witness who is not on trial has no right to the aid of counsel. *People* v. *Keeler*, 99 N. Y. 463; *Ex Parte McCarthy*, 29 Cal. 395.

57. *Fiske* v. *Kansas*, 274 U. S. 380.

58. 272 U. S. 312, 316-317.

59. See also *Mooney v. Holohan*, 294 U. S. 103, 112; *Brown* v. *Mississippi*, 297 U. S. 278, 286; *Vajtauer* v. *Commissioner of Immigration*, 273 U. S. 103, 106; and *Kwock Jan Fat* v. *White*, 253 U. S. 454, 457-458.

60. 273 U. S. at 175-176.

61. 87 Fed. (2d) 68, 71 (1936).

62. 261 U. S. 86 (1923).

63. *Norris* v. *Alabama*, 294 U. S. 587; *Powell* v. *Alabama*, 287 U. S. 45; *Fiske* v. *Kansas*, 274 U. S. 380.

64. The doctrine of separation of powers does not prevent a review by the federal courts of Congressional findings of fact. *St. Joseph Stock Yards Co.* v. *United States*, 298 U. S. 38, 49-52.

65. *Kwock Jan Fat* v. *White*, 253 U. S. 454, 457-458; *Carter* v. *McClaughry*, 183 U. S. 365, 380-381; *Carter* v. *Roberts*, 177 U. S. 496, 498; *Ex Parte Nugent*, 18 Fed. Cas. 471.

66. *Hill* v. *Wampler*, 298 U. S. 460, 465, 467; *Vajtauer* v. *Commissioner of Immigration*, 273 U. S. 103, 106; *Ex Parte Grossman*, 267 U. S. 87; *Moore* v. *Dempsey*, *supra* note 62; *Ex Parte Hudgings*, 249 U. S. 378; *Marshall* v. *Gordon*, *supra* note 53; *In re Chapman*, *supra* note 5; *In re Bonner*, 151 U. S. 242; *Minnesota* v. *Barber*, 136 U. S. 313; *In re Mills*, 135 U. S. 263; *Medley, Petitioner*, 134 U. S. 160; *Hans Nielson, Petitioner*, 131 U. S. 176; *Ex Parte Lange*, 18 Wall. 163; *Burnham* v. *Morrissey*, 14 Gray (Mass.) 226. *Contra*: *In re Falvey*, 7 Wis. 630.

67. James M. Landis has expressed the opinion that the limits of the investigative power of Congress are "the limits of legislative power." 40 Harvard L. Rev. 153, 213. In *Seymour* v. *United States*, 77 Fed. (2d) 577, the Circuit Court of Appeals for the Eighth Circuit said (pp. 579-580): "The actual limitation is that congressional investigation must be confined to matters *subject to action* by Congress or by the house conducting the investigation. . . . The limitation of power of investigation is that it must be germane to some matter concerning which the house conducting the investigation *has power to act*. . . ." (Emphasis supplied.)

68. The House, for example, could not conduct an investigation of the qualifications of a candidate for President in case no one received a majority of the electoral votes; for the Twelfth Amendment provides that if no person receives a majority "the House of Representatives shall choose *immediately*, by ballot, the President." (Emphasis supplied.)

be violated. Among the constitutional guaranties which are available to a citizen, it is believed, is the privilege against self-incrimination; for Congress has failed to provide absolute immunity from prosecution for persons called upon to give self-incriminatory testimony at a Congressional inquiry. The common law, as such, is not a restraint upon the exercise of constitutional powers of inquiry; hence the only ground upon which common law privileges of witnesses not expressly preserved by the Constitution may be claimed is that power to compel disclosures which the courts at common law would not compel is not "necessary and appropriate" to the carrying out of the constitutional functions of either branch of Congress, and therefore should not be implied. There is ample authority, however, for construing resolutions of either house directing a committee to investigate a subject and empowering it to subpoena persons and papers as not intended to give the committee power to compel disclosures which would not be required by common law courts.

The legislative power to compel disclosures of evidence may be enforced by a prosecution under the statute relating to contumacy and also by a citation for contempt. Each house of Congress has implied power to punish contempts of its authority. The question of the guilt or innocence of a citizen who is cited for contempt by either house is one to be decided by the house issuing the citation. Judicial review on a petition for a writ of habeas corpus is available to a person cited for contempt by either house where the acts said to have constituted contempt were not direct obstructions to legislative processes, and also in other cases where the house which issued the citation is without jurisdiction. A petition for a writ of habeas corpus will lie after commitment where the order of commitment is for any reason void.

Current Events

Nebraska Adopts Two Year College Rule—California and New York Also Advance Standards—Arizona, New Jersey and Kentucky Ask Courts to Increase Requirements—Tennessee Bar Requests American Bar Association to Make Law School Survey

RENEWED impetus to the drive for higher standards of admission to the bar is indicated by current news from courts of last resort and legal education committees. With increasing emphasis the bar is making known the necessity for requirements of general education at least equivalent to the two-year college recommendation of the American Bar Association. Further attention is also being given to the necessity for study in an approved school.

Seven states have appeared in the headlines within the last month in connection with bar admission requirements. Most remarkable of all recommendations made is that of the special committee in New Jersey, whose report was adopted at the recent meeting of the State Bar Association, calling for a college degree before the beginning of law study, a law school degree and, in addition, twelve months' apprenticeship. This recommendation will be presented to the Supreme Court of New Jersey and it is considered likely that open hearings in reference to it will be held.

The Most Notable Advance

Of the rules actually adopted, those promulgated by the Supreme Court of Nebraska on June 5, on the recommendations of Judges Day and Carter, constitute the most notable advance. They provide for two years of pre-legal college education and require that where law school study is depended on to qualify for the bar examinations it must be pursued in a "reputable law school," which term the court defined as meaning a school approved by the American Bar Association. Law office study is still permissible in Nebraska but is subject to rigorous restrictions, including intermediate examinations given at least once a year by which the bar examination commission may satisfy itself that the applicant is diligently and in good faith pursuing the study of law.

The minimum period of law study is three years, and where credit for law school work is sought by a student who has not completed the course required for graduation, such credit shall be allowed under the rules, provided the student has acquired ninety percent of the credit hours necessary for graduation. However, where a student has failed to graduate, he must show at least four months' additional study either in

The States shown in white require, either presently or prospectively, of substantially all candidates for admission two years of college or the equivalent.

*California applicants, before beginning the study of law, must have completed at least two years of college work or have reached the age of 25 years.

a law school or as a registered office student. The two-year college requirement applies to all persons registering as office students after June 5, 1937, and to all persons applying for admission upon examination after September 1, 1940.

Thirty-four States Require Advanced Preliminary Education

There are now thirty-four states where substantially all candidates for admission are required to have two years of college education or its equivalent. In some states, as in Nebraska, the effect of these rules is still prospective. These thirty-four states are shown in white on the map. They contain three-fourths of the population and three-fourths of the lawyers of the United States.

By the provision in the rules recognizing only schools on the approved list, Nebraska becomes the fourteenth state to refuse to recognize law school study unless it is pursued in a school which meets the American Bar Association standards.

The recommendation of the Arizona Judicial Council, approved by the State Bar at its meeting on April 30, goes a step farther in requiring graduation from a school on the approved list of the American Bar Association as a qualification for taking the bar examinations. This, of course, includes a minimum of two years of pre-legal college education. The resolution which was passed directed the Board of Governors of the State Bar, subject to the approval of the Supreme Court, to adopt a rule putting this measure into effect beginning with the first bar examination to be held in the year 1940.

California Law Unique

California, in raising its standards, has followed the legislative route. A plebiscite held last fall by the State Bar of California favored raising the standards of admission to the bar of that state by a vote of 4,312 to 364. The bill by which this was sought to be accomplished became one of the main parts of the current year's legislative program of the Association. An amendment accepted in order to secure the passage of the legislation diluted the strength of the provision requiring two years of college work by providing that an applicant "must have completed, before beginning the study of law, at least two years of college work *or have reached the age of twenty-five years.*" A further interesting section of the law provides that the applicant shall have passed, during the period of his law study, such preliminary examinations as may be required by the examining committee "provided, however, that this requirement shall not apply to students of law schools accredited by the examining committee."

It is understood to be the intention of the Committee of Bar Examiners under this provision to give an examination at the end of the first year of law study to all applicants except students in schools approved by the Committee. As to schools within the state, the approval of the Committee, it is understood, will be determined by the percentage of success of those students from each school who have taken the bar examination for the first time during the preceding three years. Should an applicant fail to pass at the first law student's examination, as this intermediate examination will be called, it is understood that he will be allowed to repeat the examination from time to time during the course of his law study but, in order to become eligible for the bar examination, he will be required to pass the law student's examination at least one year prior to the date of the first bar examination for which he may apply.

Rules Amended in New York

On recommendation of the Joint Conference on Legal Education of the State of New York, the Court of Appeals of that state on May 27 amended its rules to require that courses in afternoon or evening schools, in order to receive approval, should be four years in length and consist of at least one hundred and twenty-eight weeks of not less than eight and an average of not less than nine classroom periods of fifty minutes each. By this rule the Court joined the majority of other states in recognizing the distinction made by the American Bar Association between schools where the majority of classes are held in the morning or early afternoon and those where most of the sessions are held in the late afternoon or evening and which include in their student bodies mostly students who have outside employment.

New Jersey Recommendation

The New Jersey recommendations of an academic bachelor's degree at an approved college before the beginning of law study, of a law school degree and of a twelve months' clerkship were made by a special committee after careful consideration and followed rather extended discussion of the committee's report of the overcrowded condition of the bar in New Jersey, a fact which the committee regarded as generally admitted. A system of preceptorship and of county character committees similar to that used in Pennsylvania was also proposed. This plan provides for a county character committee in each county, to be appointed by the Justices of the Supreme Court presiding in the various circuits. Each student will be required to have a preceptor of not less than ten years' standing as a counsellor-at-law, his choice to be subject to the approval of the county character committee. The preceptor would have the duty of keeping in contact with the student during the period of his law school study and of taking the student into his office for a clerkship of not less than twelve months, at least four months of which would have to be served subsequent to graduation. No preceptor would be allowed to have more than three students in his office at any time.

When the student registered at the commencement of his law study, he would be required to present questionnaires filled out by himself, by three citizen sponsors, and by one or more teachers from both secondary school and college. He would be examined by the committee at the time of registration and again at the time he applied to take the bar examination, at which later date he would also be required to file additional questionnaires. A limitation to four of the number of bar examinations which can be taken by any candidate was also recommended.

These recommendations were all approved by the New Jersey State Bar Association meeting on June 5 and will be taken up with the Supreme Court by the special committee.

In Kentucky the State Bar, on the recommendation of its legal education committee, again approved a rule requiring two years of college education and a minimum of three years of law study. It is understood that the legal education committee will take this matter up with the Court of Appeals during the coming year.

Tennessee Asks American Bar Association to Survey Law Schools

A fact-finding survey is proposed by the following resolution passed on June 11 by the Tennessee Bar Association on the recommendation of its legal education committee:

"BE IT RESOLVED BY THE BAR ASSOCIATION OF TENNESSEE: That the American Bar Association be requested to make a survey of the law schools in Tennessee, without expense to the Bar Association of Tennessee.

"BE IT FURTHER RESOLVED: That a committee of this Association be appointed by the President to cooperate in such a survey."

This resolution has been transmitted to the Council on Legal Education and Admissions to the Bar of the American Bar Association.

Winner of Ross Bequest Award

MR. ELWOOD HUTCHESON, winner of the Ross Bequest Award for 1937 was born at Montesano, Washington, on April 24, 1902; and was graduated from the University of Washington in 1925 with the degrees of A. B. and LL. B. cum laude. While there he was a member of the debate team which defeated Oxford University, England, one of whose representatives was Malcolm MacDonald, son of the then prime minister. He is a member of Phi Beta Kappa, Phi Delta Phi, Tau Kappa Alpha, and Order of Coif.

After being admitted to the bar in 1925, he was for four years associated with the firm of Roberts & Skeel at Seattle. Since July, 1929, he has been a member of the firm of Cheney & Hutcheson at Yakima, Washington.

Mr. Hutcheson is a member of Yakima County, Washington State, and American Bar Associations. He is married and has two sons.

The subject for the essay competition in which he was successful was "The Administration of Justice as Affected by Insecurity of Tenure of Judicial and Administrative Officers."

Washington Letter—Approaching Sesquicentennial Celebration of Constitution—Proscribing Tax Avoidance—Regional Planning and Conservation—Confiscation of Departmental Documents—Increase of Powers of Trade Commission

Constitution Sesquicentennial

ONE of the important elements of approaching events is the Sesquicentennial Celebration of the formation, ratification and establishment of the Constitution, which will extend from September 17, 1937 to April 30, 1939. These dates are respectively 150 years from the signing of that instrument by the delegates or deputies to what is now known as the Constitutonal Convention, and from the inauguration of George Washington as first President, which may be considered the establishment of the government which it was designed to establish. The complete ratification period extended over more time than between these dates 150 years go, North Carolina and Rhode Island having ratified the Constitution after Washington became President.

One purpose of celebrating the founding of the Constitution, as expressed by the Director General, Representative Sol Bloom, of New York, is the "preparation and publication of important facts relating to the formation and origin of the Constitution. It is our hope to stamp out in large measure the tremendous amount of misinformation which exists today about the Constitution, and which is even taught in many schools. The people of the United States should know the facts about the Constitution and it is our purpose to give them those facts, entirely free from partisan opinions of any kind and devoid of any political coloring."

The United States Constitution Sesquicentennial Commission is composed of the President of the United States, who is Chairman, the Vice President, the Speaker of the House, five Senators, five Congressmen, including the Commission's Director General, and five Presidential Commissioners selected from various parts of the country. The Commission was provided for by a Congressional Resolution August 23, 1935. It has been said that the idea originated in 1931 with Representative James M. Beck, since deceased. Perhaps the having of a celebration at the end of 150 years was suggested by a remark of one of the deputies on the floor of the Convention in 1787 who said, "Can it be supposed that this vast country including the western territory will 150 years hence remain one nation?"

Work of the Commission

The Commission does not conduct celebrations but confines itself to preparing plans and encouraging them. It has communicated with 1760 bar associations throughout the nation. Some of the activities which the bar associations are being asked to aid and promote are: to assign their members to each school in the county or city to deliver periodical talks on the Constitution and to answer questions; to hold adult forum meetings at regular intervals featuring also lectures and debates; to furnish speakers and material for meetings and programs conducted by patriotic, fraternal, religious, and civic organizations; to make arrangements with local newspapers for publication of articles pertaining to the Constitution; to aid mayors' committees in directing local community celebrations; to present or aid pageants portraying the formation and history of the Constitution; where feasible to prepare weekly radio programs dealing with the Constitution and the men who framed it; and to assist in celebrations which are planned in the original 13 States to mark the anniversaries of ratification by those several States and also to honor the men from each State who were active in the development of the Constitution.

The Commission, which is located in the House Office Building in Washington, has prepared much material and is constantly preparing more on all phases of this Sesquicentennial Celebration. Facsimiles, with proper mountings for permanent civic or school display, have been made of both the Constitution and the Declaration of Independence. It is stated that "For the practical purpose of examining the text and reading the signatures, the facsimiles are in many ways superior to the original documents, which are somewhat faded. This is particularly true in the case of the Declaration of Independence, which is now too faded to read. The facsimile is made from the 1823 copperplate facsimile, when the document was in a much better state of preservation, and is entirely legible."

A series of photostats has been prepared of the 48 available broadsides of the type which were posted in the town halls and other public places during the ratification period. From these, the citizens of the day learned the arguments for and against the Constitution and the progress of its approval by the States. These copies are available separately or with a series of portraits of the signers.

"The Story of the Constitution"

Of great value to all students of the subject is "The Story of the Constitution," a 192-page booklet available at 10c per copy. It covers clearly and interestingly the making of the Constitution and items of associated historical interest. One feature, called an "Alphabetical Analysis" covers 36 pages. It is more than an ordinary analysis, being also a key word book or concordance listing all the important words, with their various connections and the location of each use thereof by article, section, clause, and page numbers.

The text of the Constitution, which with the list of signers covers 12 pages of the booklet, is "given as nearly as possible exactly as in the original from the engrossed parchment." The introduction further refers to the constant aim for accuracy of facts and dates "and especially of literal exactness in the reprint of the original documents. It is believed that the care which has

been taken in these matters justifies a claim of unusual correctness."

It is worthy of note that "During the early years of the National Government the printed copies of the Constitution seem to have made no attempt to be literally exact. In 1820, however, an edition was prepared in the Department of State which was 'copied from and compared with the roll.' In 1846 William Hickey published his manual on the Constitution, in which he gave a very exact reprint, generally followed ever since."

Proscribing Tax Avoidance

The Joint Congressional Committee on Tax Evasion and Avoidance is composed of six members of the Senate Finance Committee appointed by the President of the Senate, and six members of the House Ways and Means Committee appointed by the Speaker of the House. Representative Robert L. Doughton, of North Carolina is Chairman.

Methods of evasion and avoidance of the income, estate, and gift taxes are being investigated, with special reference to those methods indicated by the President in his message of June 1st. Report of the findings will be made to the Senate and House on or before February 1, 1938, with recommendations for legislation believed necessary.

The joint committee's authority includes the holding of hearings, requiring the attendance of witnesses and the production of evidence, books, records, and documents. It may secure, through the Treasury Department, data from the tax returns and may itself inspect the returns or do so through such agents or examiners as it may designate. The committee might even authorize one or more of its agents to conduct any part of an investigation in which it is engaged, to conduct hearings and to require the attendance of witnesses and the production of records; but only the committee itself may hold public hearings. Unless previously extended, authority for these proceedings will cease February 1, 1938.

Information obtained through the committee's investigations may be submitted to either House of Congress and is required to be made available to the Senate Finance Committee and the House Ways and Means Committee. These committees will determine whether the information shall be presented to their several houses. The Joint Committee has a right to make public any information secured but this right does not exist on the part of a subcommittee or of the individual members; and no such information may be made public, except through the public hearings, with respect to any particular taxpayer unless specifically authorized by the joint committee.

Regional Planning — Conservation

Following a message from the President early in June, there were introduced separate bills in each House of Congress to promote flood control, soil and water conservation, and regional planning. The House bill, H. R. 7365, by Representative Mansfield, would establish regional planning agencies. The Senate bill, S. 2555, by Mr. Norris, would establish conservation authorities.

There are many similarities in the bills. Each divides the country into seven sections for the purpose of applying its provisions. Under the Norris bill there would be: (1) the Atlantic Seaboard Authority, (2) the Great Lakes-Ohio Valley Authority, (3) the Tennessee Valley Authority, (4) the Missouri Valley Authority; (5) the Arkansas Valley Authority, (6) the Southwestern Authority, and (7) the Columbia Valley Authority. Each of the bills would place the Bonneville project, on the Columbia River in Oregon, under a Columbia Valley Authority within six months.

The Mansfield bill would give the President power to establish by executive orders regional power authorities for the purpose of controlling, operating, maintaining, and improving facilities for producing hydro-electric power whenever, in his judgment, this is required in the national public interest or for reasons of economy or efficiency. Each power authority would be in charge of an administrator and a regional power board, the authority having the status of a federal corporation. The power authorities would be permitted to generate electricity, to acquire, construct, and operate transmission lines and substations. The purpose would be to make electricity available for existing and potential markets. Rates would be determined by the authority, subject to approval by the Federal Power Commission.

Codification of Departmental Documents

The Federal Register Act would be amended by H. R. 5721, by Representative Celler, of New York, so as to require all government agencies to file, by July 1, 1938, and every fifth year thereafter, a complete codification of all documents believed to have general application and legal effect and that are relied upon as authority for the discharge of any of the functions of the agency. A codification board of six members would be designated to supervise the form, style, arrangement, and indexing of the codification. It would consist of the Director of the Federal Register and two attorneys from his office and three attorneys from the Department of Justice. The publication of the codification would constitute prima facie evidence of the text of the documents and that they are in full force on the date of its issuance.

Vacancies in Office of State Delegate Filled

GEORGE M. MORRIS, Chairman of the House of Delegates of the American Bar Association, has announced that the following have been chosen to fill vacancies in the office of State Delegate in the states of Arkansas, Illinois, Maryland and West Virginia. They will hold office until the adjournment of the 1938 Annual Meeting.

Arkansas—Henry M. Armistead, Sr., of Little Rock. Mr. Armistead has been a member of the Association for more than twenty-five years, and has practiced law in Arkansas for over forty years. He is also a member of the Little Rock and the Arkansas State Bar Associations.

Illinois — Charles M. Thomson, of Chicago. Mr. Thomson has been a member of the Association for more than fifteen years. He began the practice of law in Chicago thirty-five years ago. He recently retired as President of the Chicago Bar Association. He also served three terms as a member of the City Council; one term as a member of Congress; two years as Judge of the Circuit Court of Cook County; and ten years as Judge of the Illinois Appellate Court, First District. He was appointed Trustee of the C. E. I. Railroad September, 1933.

Maryland—Charles Ruzicka, of Baltimore. Mr. Ruzicka has been a member of the American Bar Association for more than ten years. He began the practice of law in Baltimore twenty years ago. He is a member of the Baltimore and Maryland State Bar Associations.

West Virginia—Frank C. Haymond, of Fairmont. Mr. Haymond has been a member of the American Bar Association for more than fifteen years. He started to practice law in Fairmont twenty-five years ago. He served as a member of the West Virginia Legislature for two years; was Chairman of the Insurance Law Section of the American Bar Association and is a member of the American Law Institute, the West Virginia Judicial Council, the International Association of Insurance Council and the American Judicature Society.

American Judicature Society Votes Overwhelmingly Against Supreme Court Proposal

THE results of a referendum vote of members of the American Judicature Society have been announced by Secretary Herbert Harley. They show that the members voted overwhelmingly against the President's proposals with respect to the Supreme Court and the other Federal Courts.

The ballot sent to each member contained the following statement:

"Members of the Society are requested to express their opinions on the ballot below and mail it promptly to the Secretary, Law School, Ann Arbor, Mich. At the annual meeting held May 5 the Judiciary bill was considered. Because of limited attendance no opinions were recorded, but the Directors authorized a referendum vote by Members, and events following the meeting have indicated the necessity for this.

"In an open session arranged by the former Chairman, held after the annual meeting, two addresses were made, as reported in the Journal for June, both favorable to the President's proposal as to the Supreme Court. The attendant publicity created the impression that the Society might be in favor of this proposal, although the addresses did not represent, or purport to represent, the views of the Members of the Society, but were the views only of the former Chairman and a non-member."

Following is the official vote cast on the various questions submitted:

	No	Yes
Question One—		
(a) With respect to the Supreme Court.....	609	56
(b) With respect to the other Federal Courts	408	130
Question Two—		
As to Assignment of Circuit and District Judges	356	296
Question Three—		
As to creating the office of Proctor	352	325
Question Four—		
As to right of intervention by Atty. General.	212	392
Question Five—		
Right of direct appeal by Attorney General.....	244	402

Meetings of State Junior Bar Groups in May—Kansas Holds Its First Gathering of Young Lawyers—Illinois Group Plans Ambitious Program—Tennessee and St. Louis Sections

MEETINGS of State Junior Bar Groups featured Junior Bar Conference activities during May and June.

One of the most successful Junior Bar meetings of the year, and the first of young lawyers ever held in Kansas, took place under the leadership of Frank F. Eckdall, Council Member from the Tenth Circuit, at Topeka, Kansas on May 29, during the annual sessions of the Kansas State Bar Association.

More than 100 younger lawyers assembled from all parts of Kansas and adjoining states at luncheon to hear Robert W. Pharr, Vice-Chairman of the Conference, Donald B. Hatmaker, Council Member from the Seventh Circuit, Stanley Ford, State Chairman of New Jersey and special representative of the American Bar Association and Frank M. Brockus, Chairman of the Arrangements Committee for the Kansas City meeting.

Mr. Pharr told the group of the work, plans and program of the Conference. Mr. Hatmaker stressed the opportunities which the Conference offers to young lawyers for training, leadership and service to the community, and the advantages of association with their colleagues from various parts of the country and with the older leaders of the bar.

Stanley Ford, representing the special American Bar Association Committee in Opposition to the Supreme Court Plan, outlined the work of the Committee and urged cooperation with it. Mr. Ford spoke later before the general session of the State Bar, and following his appeal, the Kansas State Bar voted the appointment of a committee to cooperate with the American Bar Association Committee. Mr. Brockus extended a personal invitation to the younger lawyers to attend the Kansas City meeting in September.

The "Lewis and Clark" expedition to bring all young lawyers in the Tenth Circuit into the Conference, headed by Robert M. Clark, Chairman of the Circuit Membership Committee, and Phil H. Lewis, State Membership Chairman, started out in a new membership drive with the announcement at the meeting of the appointment of seven new membership chairmen in Kansas. The men appointed were Jack Hunt, Topeka; Stanley Toland, Iola; Chandler Jarvis, Winfield; Harry T. Coffman, Lyndon; W. A. Kahrs, Wichita; William H. Waggner, Jr., Wakeeney; and John Fontron, Hutchison.

Visitors to the Topeka meeting reported it to be one of the most enthusiastic and successful they had attended.

* *

A highly interesting meeting of the newly formed Section on Younger Members Activities of the Illinois State Bar Association was held in conjunction with the Sixty-First annual meeting of the Association in Chicago on May 19, 20 and 21, 1937, where officers for the ensuing year were elected and an ambitious program planned.

James P. Economos, State Chairman for Illinois, was elected Chairman of the Section. The other officers are: Amos M. Pinkerton, Taylorville, Vice-Chairman; Robert W. Williamson, Springfield, Secretary, and Austin J. Doyle, Chicago, Donald B. Hatmaker, Chicago, Hayes Murphy, Rock Island, Fred W. Potter, Jr., Peoria, Charlotte Slavitt, Chicago, and Karl Yost, Wilmette, members of the executive committee.

The Section during the coming year, it was planned, will concentrate upon supervision of Law School Associations, the conduct of ceremonies of admission to the Bar of Illinois, legal aid, cooperation with other sections in research activities and upon membership work. The Section unanimously recommended to the Board of Governors that they be given permission to affiliate with the Junior Bar Conference, which permission is expected to be granted by the Board at its next meeting.

* *

The Junior Bar Section of the Tennessee Bar Association met in Memphis on June 10. Vice-Chairman Robert Pharr, James N. Ogden, State Chairman of Mississippi and Chairman of the Junior Bar Section of the Mississippi Bar Association, Howard Cockrill, State Chairman of Arkansas, Gordon Young, State Chairman of the Junior Bar Section of the Arkansas State Bar Association, and Jerry Glenn, Chairman of the Little Rock Junior Bar Association were speakers at the business meeting. General John T. Barker, former Attorney General of Missouri and member of the House of Delegates of the American Bar Association, gave the address at the well attended dinner. R. Boyte C. Howell, Jr., State Chairman of Tennessee, and Auvergne Blaylock, Membership Committeeman, were presiding officers, and Seneca B. Anderson, Memphis, Member of the Council for the Sixth Circuit, made the address of welcome.

Robert W. Pharr was elected Chairman of the Section at the business meeting, and is planning to hold a

Council meeting soon for the purpose of planning a program.

* *

The recently formed Junior Bar Section of the St. Louis Bar Association, which now has a membership of approximately ninety, has applied for affiliation with the Junior Bar Conference. This organization was started largely through the work of Lon Hocker, Jr. The officers are as follows: Russell Doerner, Chairman; Lon Hocker, Jr., Vice-Chairman; Milton Greenfield, Jr., Secretary and Treasurer and Wallace Wilson and Frederick Eppenberger, members of the Council.

* *

As previously announced, all resolutions for consideration at the Kansas City meeting should be submitted, if possible, in writing to the Chairman of the Resolutions Committee prior to the Kansas City meeting. Chairman Stecher has announced the appointment of Robert M. Clark, Topeka, Kansas, as Chairman, and of the following Committee members: W. G. Troxler, Miami, Florida; Earl F. Morris, Columbus, Ohio; H. Howard Cockrill, Little Rock, Arkansas; and C. Edward Duffy, Wilmington, Delaware. Five copies of each resolution should be supplied so that the Chairman may furnish each of his Committee members with a copy.

Indications are that the Kansas City meeting will be the largest attended meeting in the history of the Conference. It is recommended that reservations be made as soon as possible.

Letter

A World Congress of Bar Associations

EDITOR, AMERICAN BAR ASSOCIATION JOURNAL:

In 1939, shall the American Bar Association summon a World Congress of Bar Associations at Washington?

At the January meeting of the Board of Governors, a Committee was authorized to consider and report on this proposal; the President appointed on that Committee Newton D. Baker, chairman, William L. Ransom, and Frank T. Boesel. That Committee will want to know something of the Bar opinion on the proposal.

So, if you should form an opinion, write soon to the Chairman, and tell him what it is.

Before forming an opinion, give some weight to these considerations:

(1) Lawyers in all countries (even more than in ours) have an influence on national policies, and thus can help towards a rational attitude in international affairs.

(2) There has never yet been an international congress or convention of national bar associations; though nearly every other profession or occupation has such regular meetings.

(3) The American Bar Association should take the initiative, because it is the best organized, most active, and most efficient, of all Bars. The visitors' observation of our methods would have useful suggestions for the profession in other countries.

(4) Exchange of views with the able leaders of the profession in other countries would broaden our own views, and would stimulate helpful professional relations with the Bars of other nations.

JOHN H. WIGMORE.
Chicago, June 12, 1937.

News of the Bar Associations

Iowa State Bar Association Holds Forty-Third Annual Meeting—President Pryor Discusses Inherent Power of Courts in Relation to Bar—Forward-Looking Attitude Shown at Meeting—Opposes Supreme Court Proposal

THE Forty-third Annual Meeting of the Iowa State Bar Association was held at Mason City, Iowa, on June 10 and 11 with over five hundred lawyers present. The principal subjects considered were the integration of the Bar, increased standards for admission to the Bar, the unauthorized practice of the law, and the proposed new Federal Rules of Civil Procedure, which were discussed in both the Junior Bar Section and the Civil Procedure Section of the Meeting.

Honorable J. C. Pryor in his President's Address discussed the inherent power of the court in relation to the Bar. He outlined the history and discussed the decisions on the rule-making power of courts, and their authority to promulgate rules for the better administration of justice and the regulation of courts in the performance of their judicial duties. He pointed out that Bar integration was within the scope of the court's power, as well as the subject of legislative authority, and expressed the desirability of the court's acting upon its own motion in accomplishing this result. These powers, he stated, may properly include the establishment of standards for admission to practice before the courts, in addition to those fixed by legislation.

Conceding concurrent authority in the legislative department of government, he regarded these matters as so intimately concerned with the judicial problem that it was better to have court action upon them than to resort to the legislative process, which might delay the procedure and subject it to unnecessary rigidity. Furthermore, he regarded the dominant authority in regulation of matters pertaining to courts as held by the courts themselves, even to the extent of overriding legislative action.

Important Resolution Adopted

Mr. Pryor's address was well received by the Bar, and, in connection with the preliminary work done before the meeting, resulted in action by the Bar Association in unanimously adopting a resolution urging that the Supreme Court adopt rules establishing an integrated Bar in Iowa, and increasing the admission requirements to the practice of law in this state.

The Association meeting was marked by the forward-looking attitude on the part of the Bar of Iowa. There was much evidence of an introspective consideration of lawyers' problems. Critical consideration was given to various measures for the improvement of the Bar, and to its own responsibilities to the public. Particularly appreciated was the stimulating and constructive address given by Professor George G. Bogert, of the Law School of the University of Chicago, and author of the work on Trusts. Professor Bogert analysed problems facing the legal profession today, and pointed out diverse ways in which organized action of the

BURT J. THOMPSON
President, Iowa State Bar Association

Bar could materially improve the standing of the Bar with the public, as well as aiding the Bar itself in handling its own problems. His address was exceptionally well received, with its many pointed suggestions for Bar Association activity.

Resistance to Supreme Court Proposal Urged

The question of President Roosevelt's proposal on changing the organization of the Supreme Court of the United States was presented to the Bar, and a motion was passed establishing a committee, to be appointed by the President of the Association, with a member from each Congressional District, to urge throughout the state resistance to any change impairing the independence of the judiciary and legislative efforts to control the Court. The Association went on record as being definitely opposed to the proposal.

As the concluding number on the program of the meeting, Judge Seth Thomas of the Circuit Court of Appeals addressed the Association on the subject of the origin of the power of courts to declare statutes unconstitutional. Judge Thomas, of Fort Dodge, Iowa, and a former President of the Association, gave a scholarly presentation of the subject. Firm in his belief in judicial authority, he expressed the need of forward-looking judges, awake to the problems of the day, and open-minded as to the need of change as well as stability in the law. With the power to declare legislation unconstitutional, which is important to the true functions of the judiciary under our system of government, he emphasized the demand that courts take great care in testing legislation, with full appreciation of the problems of the day, and the changng conditions under which legislation must operate.

The new officers elected to administer the work of the Association for the coming year were: Burt J. Thompson, Forest City, President; Henry C. Shull, Sioux City, Vice-President; Mason Ladd, Iowa City, Secretary-Treasurer; Thomas B. Roberts, Des Moines, President of the Junior Bar Section. Mr. Burt J. Thompson of Forest City has been active in the Association for many years. He is one of the leading lawyers of northern Iowa, and has had a broad experience in all types of litigation. Intensely interested in the integration of the Bar, in broadening the scope of activity of Bar organization, and in enlarging the interest in good citizenship in the state, President Thompson's leadership of the Association should result in the accomplishment of these professional ends. His selection as President should assure the effective carryng out of the various measures adopted at the Annual Meeting, and a vigorous program for the Association during its forty-fourth year.

MASON LADD, Secretary.

Kentucky State Bar Association Holds Third Annual Meeting Under Bar Integration Act—Committee to Be Appointed to Consider Pensions for Retired Court of Appeals Judges—Addresses Delivered—Meeting Marked by Great Enthusiasm

THE third annual meeting of the Kentucky State Bar Association as reorganized under the Bar Integration Act of 1934 was held in Louisville, Kentucky on June 2-4, 1937, both inclusive. President J. Robert White of Glasgow, Kentucky presided.

The meeting was called to order on June 2nd at 7:30 P. M. and Section Meetings of the following committees were held, to-wit: Criminal Law; Law Reform; Legal Education and Admission to the Bar; Cooperation with American Bar Association; Unlawful Practice of Law; District Bar Organization; Kentucky Statutes and Kentucky Bar Journal.

At 9:30 P. M. that evening the Section Meetings were concluded and the State Association was host to its members at a Smoker given in the ballroom of the Kentucky Hotel.

At 10:00 o'clock, A. M. on June 3rd the business program of the convention commenced. In addition to the reports of committees, outstanding addresses were delivered during that morning and afternoon were by Hon. J. Robert White, Glasgow, Kentucky; Hon. James W. Martin, Commissioner of Revenue, Commonwealth of Kentucky, and Director (on leave) of Bureau of Business Research, University of Kentucky, on "Tax Policy in Kentucky;" Judge Samuel M. Wilson, Lexington, on "William H. Mackey, First President of the Kentucky State Bar Association;" Hon. E. Smythe Gambrell, Atlanta, Georgia, on "The Privileges and Obligations of the Profession of the Law;" and Hon. Alex L. Ratliff, Chief Justice of the Court of Appeals of Kentucky, on "The Workings of the Court of Appeals." These addresses were enthusiastically received and conveyed messages of unusual interest to all practitioners.

At 7:30 o'clock, P. M. on June 3rd the annual dinner and dance was held in the Hotel. The Law Alumni of the University of Louisville, which is celebrating its centennial this spring, joined with the State Association in arranging this banquet and dance. President White presided as toastmaster. Hon. A. B. Chandler, Governor of Kentucky, was presented by President White and following an address by Governor Chandler, he presented the principal speaker, Hon. Chas. E. Wyzanski, Jr., Special Attorney General of the United States. Mr. Wyzanski spoke on "The Lawyer's Relation to Recent Social Legislation." His address emphasized the responsibility of lawyers in recent industrial and economic developments and served to stimulate thought as to their duties and responsibilities. Following these addresses distinguished visitors were presented and dancing followed.

The session on June 4th opened with committee and officers' reports. Addresses were made at this session by Hon. R. Allan Stephens, Springfield, Illinois, Secretary of the Illinois Bar Association, on "The Lawyer and His State Bar Association;" Judge Wm. B. Ardery, Paris, Kentucky, representing the Judicial Council; Hon. E. J. Felts, Russellville, Kentucky, representing the Commonwealth's Attorneys Association; and Hon. Chester O. Carrier of Leitchfield, Kentucky, President of the County Attorneys Association.

A resolution was adopted calling for the appointment of a committee to consider the subject of pensions for retired judges of the Court of Appeals of Kentucky.

All business sessions of the convention were well attended and more than six hundred members registered.

Great enthusiasm and interest was manifested in the committee and officers' reports and the addresses.

The election of officers of the Association is not held at the annual meeting but follows the selection of Commissioners who are elected in October of each year.

SAMUEL M. ROSENSTEIN,
Secretary.

Louisiana State Bar Association Holds Fortieth Annual Meeting—Committee Appointed to Oppose President's Supreme Court Proposal—President Brumby's Address—Action in Regard to Working Out a Governing Statute Satisfactory to Profession Etc.

THE Fortieth Annual Meeting of the Louisiana State Bar Association was held in New Orleans, April 23 and 24, 1937. The convention was well attended and much interest was manifested.

Hon. Frederick H. Stinchfield of the Minnesota bar, President of the American Bar Association, was one of the guests of honor and one of the principal speakers. He addressed the Association on the morning of the second day of the sessions on the topic of the President's proposal to add six members to the supreme Court. Mr. Stinchfield's address was given much attention and was widely commended. At its conclusion the following resolution was adopted:

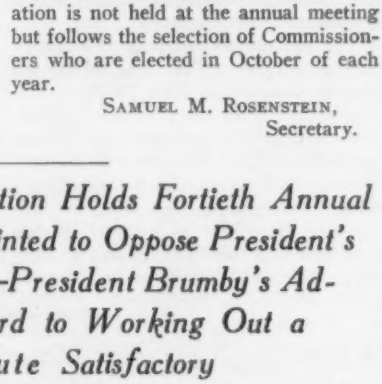
Committee to Cooperate with American Bar Association

"WHEREAS, the members of the Louisiana State Bar Association by an overwhelming vote have expressed their disapproval of the proposal of President Roosevelt to reorganize the Supreme Court; and

"WHEREAS, the American Bar Association has likewise gone on record by referendum vote of its members in opposition to the President's proposal and is vigorously opposing the plan; and

"WHEREAS, President Stinchfield has requested the Louisiana State Bar Association to cooperate with the American Bar Association in its efforts to stimulate free discussion of the President's Supreme Court proposal and to appeal to civic bodies, organizations and citizens generally here and elsewhere to register their views with their representative in Congress.

"NOW, THEREFORE, BE IT RESOLVED that the incoming president of this association appoint a committee of members of this association to cooperate with the President and Board of Governors of the American Bar Association in opposing the President's Supreme Court proposal."



MONTE M. LEMANN
President, Louisiana State Bar Association

The other guest of honor and principal speaker was Hon. V. A. Griffith, Associate Justice of the Supreme Court of Mississippi. His address was delivered at the forenoon session of the first day and was entitled "Uniform Judicial Procedure." Judge Griffith's address was interesting and instructive and the manner in which same was received showed the listeners' appreciation of the care and thought given same.

Robert E. Brumby, of the Franklin bar, President, called the convention to order. The invocation was pronounced by Rev. Elmer C. Gunn, Presiding Elder, M. E. Church South, New Orleans District; Claude W. Duke of the New Orleans bar, represented the Mayor of New Orleans in welcoming the delegates on behalf of the City of New Orleans, and John E. Jackson, President of the New Orleans Bar Association, welcomed the delegates on behalf of the New Orleans Bar. Allen Barksdale, of the Ruston bar responded to the addresses of welcome.

President Brumby then delivered his address. Speaking of current State and National legislation, he said that the outstanding fact to him was the drift to centralized government, adding that "a centralized and paternalistic government in the hands of an unscrupulous or over-ambitious executive is easily turned into a dictatorship. And unless I have misread history, such leaders appear sooner or later." He then proceeded to refer to the steps which had been taken to carry out certain instructions whch had been given the Executive Committee as follows:

Conference with Committee of State Bar of Louisiana

"At the Association meeting in Monroe, you charged the Executive Committee with the duty of taking such action as it deemed advisable towards conferring with the State Bar of Louisiana and any local bar associations with a view of working out a governing statute for the profession satisfactory to all parties. A committee from our Association, composed of Messrs. Lemann, Kaiser, Thompson and Baldwin, conferred with a committee from the State Bar of Louisiana and the New Orleans Bar Association shortly after the Monroe meeting and immediately before the meeting of our Legislature in 1936. The conference was unable to agree immediately upon a definite plan of action satisfactory to all parties and it adjourned with the expectation that there would be a further conference.

"Due, as we were later informed, to lack of time on the part of the representatives of the State Bar of Louisiana, this later conference was not held. However, a bill was introduced into the Legislature amending the act of 1934, to provide for a governing board elected by the lawyers themselves and for the elimination of the objectionable affidavit feature, the whole to become effective after two years. Our Executive Committee submitted a letter to the Judiciary Committee at the hearing on this bill, in which we reiterated the views of this Association as to what changes were necessary in the act and when they should take effect. We made no recommendation. Apparently the proponents of the bill did not push it before the committee, the bill was reported unfavorably and, of course, defeated.

Position of Association's Committee

"Our Committee felt then and feels now that it took the only position which

it could take in the matter. We made no contest against such amendments as were offered and contented ourselves only with placing our Association squarely upon record as standing at all times for an independent bar with officers elected only by the lawyers, and admissions and disbarments controlled by our Courts. Inasmuch as the practice of law requires absolute independence of thought and action, our Committee believed, and I understand this Association to believe, that placing an association of lawyers in any wise under the government of officials not elected by the lawyers themselves in a free and untrammeled election is an effort to regiment the profession, to lessen its independence and to deprive it not only of rights which it has enjoyed from time immemorial, but which are enjoyed by all other professions and even by the trades."

President Brumby then spoke of the recent plebiscite of members of the Association, in which the vote was over six to one against the President's proposal with respect to the Supreme Court; referred to the significance of the American Bar Association's recognition of the Bar Association of Louisiana, as entitled to representation in the House Delegates, and concluded by speaking of the importance of the work of a bar association.

The Association thereupon adopted a resolution approving the action of the Executive Committee in regard to working out a governing statute for the profession satisfactory to all parties, and referring the matter back to that committee for such action as it deems advisable.

W. W. Young, New Orleans, Secretary-Treasurer, presented his report, which showed a gain in membership.

Addresses Delivered

The following addresses were also delivered and were received with interest and appreciation:

"What's Right With the Lawyers," Dean James Thomas Connor, School of Law, Loyola University, New Orleans.

"Recent Developments in Louisiana Oil and Gas Laws," George A. Wilson, Professor of Law, Tulane University of Louisiana.

"Trends in Legal Education," Dean Frederick K. Beutel, Law School, Louisiana State University.

The reports of the various Standing and Special Committees were read, among them being the Special Committee on American Law Institute, Samuel Welmore Plauché, Lake Charles, Chairman. There were informal statements, by those doing the work, with reference to preparation of Louisiana Annotations to the Restatements of the Law on Conflict of Laws, Torts, Contracts

and Agency. The first named has been completed and it is expected same will be available in printed form shortly. The report and statements show that the work of annotating is receiving the attention of the Association's Committee and others in charge.

The social features included a luncheon, bridge, card games, golf, etc., New Orleans Country Club, for visiting ladies, on Friday; luncheon and Regatta, Southern Yacht Club, Saturday and Banquet and dance Saturday night.

The officers elected are: Monte M. Lemann, New Orleans, President; Eugene Stanley, New Orleans, V. P. 1st Sup. Ct. Dist.; Pike Hall, Shreveport, 2nd; Dan Debaillon, Lafayette, 3rd; Carey J. Ellis, Jr. (Judge), Rayville, 4th; Charles Vernon Porter, Baton Rouge, 5th; Jacob S. Landry, New Iberia, 6th; W. W. Young, New Orleans, Secretary-Treasurer.

The officers with five members appointed by the President at large, constitute the Executive Committee. The members so appointed by the President are: Thomas M. Wade, Jr., St. Joseph; Magee W. Ott, Franklinton; Benjamin Y. Wolf, New Orleans; Sam H. Jones, Lake Charles; H. C. Walker, Jr., Shreveport.

Stephen A. Mascaro is Librarian and Assistant to the Secretary-Treasurer.

In accordance with the resolution adopted, President Lemann appointed the following members of the Association's Special Committee on the President's Supreme Court Proposal: Charles E. Dunbar, Jr., Chairman; Henry P. Dart, Jr., Burt W. Henry, Chas. F. Fletchinger, John D. Miller, Robert E. Brumby, M. Cary Thompson. Monte M. Lemann, President, Ex-officio.

The Special Committee immediately after its appointment, issued a strong statement opposing the President's Supreme Court proposal and urging all citizens of liberal views to oppose such a reactionary measure.

W. W. YOUNG, Secretary.

WILLIAM J. MORRISON, JR.
President, N. J. State Bar Association

New Jersey State Bar Association Closes Active Year with Successful Meeting at Atlantic City—Committee Appointed to Oppose President's Supreme Court Proposal Makes Report — Committee on WPA Projects Etc.

THE annual meeting of the New Jersey State Bar Association was held on June 4 and 5 last at the Traymore Hotel in Atlantic City. The meeting, which consisted of three business sessions and a banquet, was preceded by sessions of our four sections, Banking Law, Commercial Law, Junior, and Municipal Law, closed a most active Association year.

First Bar to Oppose President's Plan

The mid-year meeting held on February 5 in Newark saw the New Jersey State Bar Association as the first Bar Association in the country to take action against the proposals of the President with regard to the United States Supreme Court. Resolutions strongly opposing the intention of the President were adopted at the meeting and sent to every Senator and Representative in Congress. Once again New Jersey became an historic battle ground for America's fundamental principles. A committee appointed in accordance with the resolution reported great activity since the February meeting. New Jersey members were of great assistance to the American Bar Association at Washington.

A unanimous vote in February to attempt integration of the Bar climaxed several years of study and work on the part of a special committee during the hearings on this question. Coupled with the intensive study of this special committee, were the visible benefits that had been derived within a short time through the creation of a General Council in the Association, an advisory body composed of representatives from every County Bar Association in the State. This is now one of the definite objectives of our Association.

The June meeting also marked the culmination of several years' study by committees on Legal Education, coordinated and finally compiled into form for final action by a special committee appointed in February. After much discussion and debate the report of the committee was accepted as formulated. The report recommended much higher standards of pre-legal education, strict preceptorship and more thorough investigation on the part of character and fitness committees. The recommendations will be presented to our Supreme Court for its consideration.

Report of Committee on W.P.A. Projects

One of the most interesting reports was that of the Committee on W.P.A. Projects. We have had almost 600 applicants in the state for W.P.A. work of whom many are already at work on approved projects. The committee is making a particular effort to help our lawyers who are in need to keep their morale, self-respect, and professional identities. This committee stepped into a real emergency in this State and is doing a fine piece of work.

The speakers at the business session were former Vice Chancellor Merr

Lane of Newark, who spoke on "Chancery Practice," and former Judge William H. Speer of Jersey City, who spoke on "Trial Tactics." Both of these addresses were very well received and interesting in that they dealt with factors to be met in practice.

Mr. George M. Morris of Washington, D. C., Chairman of the House of Delegates of the American Bar Association, gave a most interesting address on the work of that Association. Mr. Morris made those who heard him realize that the American Bar Association is a most potent factor not only in the profession but also in American life today.

Mr. William W. Evans of Paterson, New Jersey, the retiring President, spoke not only of the matters which had occurred during his administration but called upon every lawyer to carry on best traditions of the profession. He introduced Mr. William J. Morrison, Jr., of Hackensack, the newly elected President.

The banquet on Saturday evening was a delightful affair and was addressed by Mr. Frank J. Hogan of Washington, D. C., whose charm and wit are well known.

The new officers of the New Jersey State Bar Association for the year are: President, William J. Morrison, Jr., Hackensack; First Vice President, William D. Lippincott, Camden; Second Vice President, Allen B. Endicott, Jr., Atlantic City; Third Vice President, Sylvester C. Smith, Jr., Phillipsburg; Treasurer, Joseph J. Summerill, Jr., Camden; Secretary, Emma E. Dillon, Trenton.

EMMA E. DILLON, Secretary.

North Carolina Bar Association Shows Enjoyable and Successful Annual Meeting Can Be Held on Water— Supreme Court Proposal Disapproved, Etc.

THE thirty-ninth meeting of the North Carolina Bar Association was held on board the S. S. Reliance on a Convention boat cruise from Norfolk to Bermuda conducted by Thomas Cook & Son, June 19-24, 1937. Nearly five hundred North Carolina lawyers, relatives and friends enjoyed a most delightful cruise.

On the evening of June 19 the President's address was delivered by Hon, B. S. Womble, of Winston-Salem, who voiced strong opposition to the Federal Judicial Bill now before Congress. On the night of Monday, June 21, at the St. George Hotel, Bermuda, a banquet was held, former Governor J. C. B. Ehringhaus replying to an address of welcome from Sir O. Rowan-Hamilton, Chief Justice of Bermuda. On the return trip, Wednesday, June 23, a masterly address was delivered by Hon. A. D. MacLean, of Raleigh, former Assistant United States Attorney General, his subjects being "Lawyers — Conservators of Democracy." This was followed by an interesting Junior Bar program in charge of Egbert Haywood of Durham.

The following resolution was adopted condemning the Court proposal:

"Be it resolved by the North Carolina Bar Association in Convention assembled that we contemplate with concern the proposal now pending in Congress to enlarge the Supreme Court of the United States under prevailing conditions, and reaffirm the self-evident proposition that an independent judiciary is essential to the protection and preservation of the constitution and the rights and liberties of the people."

Francis E. Winslow of Rocky Mount was elected President of the Association succeeding B. S. Womble of Winston-Salem and Henry M. London of Raleigh was re-elected for the seventeenth time as Secretary-Treasurer. The following were elected Vice-Presidents: O. M. Mull, Shelby; Herbert F. Seawell, Jr., Carthage; W. D. Pruden, Edenton. Messrs. W. Frank Taylor, of Goldsboro, and Kerr Craige Ramsay, of Salisbury, were elected members of the Executive Committee, the hold-over members being Messrs. Fred L. Sutton, Chairman, Kinston; Allston Stubbs, Durham; L. J. Poisson, Wilmington, and T. A. Uzzell, Jr., Asheville.

H. M. LONDON, Secretary.

FRANCIS E. WINSLOW
President N. C. Bar Association